88-660

Supreme Court, U.S.
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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

SIMKINS INDUSTRIES, INC.,
Petitioner

v.

SIERRA CLUB,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED

1. Does § 505 of the Clean Water Act abridge the Article III standing requirement of "redressability" by authorizing private citizens to seek a judicial award of penalties to the United States Treasury?

2. In reviewing a summary judgment rendered in direct conflict with *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. ——, 108 S.Ct. 376 (1987), did the Court of Appeals err by finding a continuing violation of the Clean Water Act never charged by complaint or motion and negated by the unchallenged findings of fact?

[Note: Petitioner reserves the right to argue Question 3 in the event certiorari is granted on both the above questions, but does not include Question 3 among the reasons for the grant of certiorari.]

3. Did the court below err in holding that the failure to file discharge-monitoring reports, without more, constitutes the violation of "an effluent standard or limitation"—the jurisdictional requisite of a citizen suit under § 505(a) of the Clean Water Act?

PARTIES TO THE PROCEEDINGS

Petitioner and defendant-appellant below, Simkins Industries, Inc., has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1. Respondent and plaintiff-appellee below is the Sierra Club.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Simkins Industries, Inc., respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, entered in the above-entitled proceeding on May 31, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported at 847 F.2d 1109 and is reprinted in the appendix hereto ("App.") at 1a.

The opinion of the United States District Court for the District of Maryland (Murray, J.), entering summary judgment against the Petitioner on issues of liability, is reported at 617 F.Supp. 1120 and is reprinted at App. 1a. The opinion of the District Court, assessing a $977,000 civil penalty against Petitioner, is reported at 17 Envt'l. L. Rptr. 20346 and is reprinted at App. 42a. The unreported opinion of the District Court denying subsequent motions is reprinted at App. 58a.

JURISDICTION

Respondent Sierra Club brought suit in the District Court alleging jurisdiction under Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a). Petitioner filed a motion for judgment on the pleadings based on lack of subject-matter jurisdiction, which was denied by the District Court on June 18, 1985. App. 41a. The District Court then entered partial summary judgment against Petitioner and on July 31, 1986, assessed $977,000 in civil penalties against Petitioner. App. 57a.

Petitioner appealed. The Court of Appeals affirmed on May 31, 1988. App. 17a, 68a. A timely-filed petition for rehearing was denied on July 27, 1988. App. 69a.

The jurisdiction of this Court to review the judgment of the Fourth Circuit is invoked under 28 U.S.C. § 1254(1).

PERTINENT STATUTORY PROVISION

Section 505 of the Clean Water Act, 33 U.S.C. § 1365, provides in pertinent part:

> § *1365. Citizen suits*:
>
> (a) *Authorization; jurisdiction*
>
> Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> (1) against any person * * * who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
>
> (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizen-

ship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be, and to apply any appropriate civil penalties under section 1319(d) of this title.

* * * *

(g) *Citizen*

For the purposes of this section, the term "citizen" means a person or persons having an interest which is or may be adversely affected.

STATEMENT UNDER RULE 28.4(b)

Because the proceeding draws into question the constitutionality of Section 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a), an Act of Congress affecting the public interest, and neither the United States nor any agency, officer, or employee thereof is a party, it is noted that 28 U.S.C. § 2403(a) may be applicable.

While this case was pending on appeal, the United States sought to intervene but its application was denied by the Fourth Circuit. App. 2a-3a n.1. No court of the United States as defined by 28 U.S.C. § 451 has, pursuant to 28 U.S.C. § 2403(a), certified to the Attorney General the fact that the constitutionality of such Act of Congress has been drawn in question.

STATEMENT OF THE CASE

Petitioner, Simkins Industries, Inc. ("Simkins"), operates a paper mill in Catonsville, Maryland, manufacturing paperboard from recycled waste paper. App. 46a. The Maryland State Department of Health and Mental Hygiene issued Simkins a permit under the Clean Water Act, 33 U.S.C. § 1342, authorizing it to discharge specific effluents into the adjacent Patapsco River. The permit required Simkins to monitor three outfalls at its plant at monthly intervals. The monitoring results were to be summarized quarterly in a Discharge-Monitoring Report

("DMR") submitted to the Department no later than 28 days following the end of each calendar quarter. Ct. App. Joint Appendix ("J.A.") at 21.

On August 31, 1984, Sierra Club mailed Simkins a letter (App. 76a) pursuant to 33 U.S.C. § 1365(b)(1)(A), requiring 60 days prior notice as a precondition to filing a citizen suit under § 1365(a)(1). The letter stated that Sierra Club had reason to "believe" that Simkins "has violated and continues to violate" its permit by failing to file any DMRs from August 1, 1981, to March 31, 1984. App. 76a-78a.

Simkins' prompt responses to the letter were summarized in findings of fact by the District Court (App. 46a-53a). On August 29, 1984, two days before Sierra Club mailed notice, Simkins directed its officials to comply with its permit monitoring and requirements. On September 4, 1984, Simkins retained outside chemists to perform the required monitoring and to file the quarterly DMRs in compliance with its permit. App. 50a-51a. The District Court also found that, after conducting monthly tests on September 30, 1984, and filing DMRs on October 1, 1984, Simkins has continued ever since to file the quarterly DMRs required by its permit (App. 51a).

A. District Court Proceedings

On October 31, 1984, after 60 days had expired, Sierra Club filed a citizen suit against Simkins in the District Court. Its complaint invoked jurisdiction under § 505(a) of the Clean Water Act, 33 U.S.C. § 1365(a). App. 71a. Sierra Club identified itself as a California-based conservation organization with members residing near the Patapsco River whose recreational interests were "adversely affected" by Simkins' permit violations (App. 73a). The complaint alleged: "Defendant *has violated* the waste water discharge limits contained in its NPDES permit, as set forth in a letter to the Defendant dated August 31, 1984, attached hereto as Exhibit A and in-

corporated by reference herein." App. 74a (italics added). In contrast to the August letter, the complaint did not allege that Simkins was continuing to violate its permit or that Simkins had failed to comply since receipt of the notice.

By way of relief, the complaint requested an order to declare Simkins "to have violated" the Clean Water Act, enjoin Simkins from "further violation" of its permit, and direct it to pay civil penalties of $10,000 per day of violation. App. 74a-75a. In addition, Sierra Club sought attorney's fees, expenses, and costs (App. 75a).

Simkins moved for judgment on the pleadings. Its motion challenged the Article III standing of Sierra Club to bring a citizens suit for penalties and objected to the failure of the complaint to state a violation of an "effluent standard or limitation" in the Simkins permit, as § 505 requires (J.A. 33). Supported by DMRs filed by Simkins, the motion contended that Simkins was in present compliance with its permit and could not be sued under § 505 for wholly past violations (J.A. 33, 34).

Sierra Club moved for partial summary judgment on the sole ground that it was undisputed that Simkins "has violated" its permit by failing to file DMRs in the past (J.A. 68, 84). During argument on the motions (J.A. 85), Sierra Club proffered the affidavit of its member, John Railey, attesting to his "interest in monitoring the discharge of effluents into the Patapsco River." J.A. 112.

On June 18, 1985, the District Court rejected Simkins' contentions and granted summary judgment for Sierra Club as to liability. App. 40a-41a. In an opinion by Judge Murray,[1] the Court held that Sierra Club acquired Ar-

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[1] During a conference in chambers, Judge Murray disclosed to counsel his former membership in the Sierra Club and offered to recuse himself and transfer the case to another judge if any litigant was concerned (J.A. 333, 338, 341). These disclosures

ticle III standing demonstrating "that the interest of [its] members may be adversely affected by defendant's noncompliance with its permit requirements." App. 38a. Second, the Court ruled that Sierra Club "may maintain an action against defendant for past violations even if defendant now complies with the terms of its NPDES permit." App. 39a. It held "that civil penalties may be recovered in citizen suits for past violations" and treated Simkins' present compliance as "irrelevant to plaintiff's cause of action." App. 39a. Finally, Simkins' admitted failure to file DMR's was held to constitute a violation within the purview of § 505. App. 41a.[2]

Having decided Simkins' liability for its past violations of the DMR provision of its permit, the District Court held a bench trial limited to the amount of civil penalties to be assessed. App. 42a. In its written submission, Sierra Club urged the Court to impose $320,000 in penalties and to direct Simkins to pay the penalties to a State clean water fund for use in cleaning up the Chesapeake Bay (J.A. 373). On July 31, 1986, Judge Murray concluded that the failure to file 11 DMRs covered 977 days and thus justified a maximum penalty of $9,770,000. App. 55a. However, the Court found that such violations were "not so egregious as to warrant the full assessment of $10,000 per day" but that a penalty of $977,000 would "serve as a sufficient deterrent" (App. 55a).

Counsel fees and other litigation expenses were awarded to Sierra Club. App. 56a. No injunctive relief

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were not placed "on the record", as required by 28 U.S.C. § 455(e). As soon as it became aware of these facts, Simkins moved for recusal but Judge Murray's denial of the motion (App. 59a-63a) was sustained on appeal (App. 14a-17a). Those rulings are not challenged in this Petition.

[2] In a later opinion, the Court explained that "the fact that no pollution existed is not relevant to the court's decision to assess penalties for failure to comply with Maryland's reporting requirements." App. 66a n.8.

was considered or granted. Despite the formal prayer in its complaint for an injunction (App. 75a), Sierra Club did not request injunctive relief in its final submissions and took no appeal from the Court's failure to issue an injunction.[3]

B. Court of Appeals Proceedings

Simkins did appeal to the Fourth Circuit, which affirmed the judgment for penalties. The primary thrust of the appeal was a renewed, two-pronged challenge to the Article III standing of Sierra Club to maintain a citizen suit for civil penalties payable to the United States. First, Simkins argued that proof of the "injury" component of standing[4] was not satisfied by the Railey affidavit. Second, Simkins contended that the "redressability" component of standing cannot be abridged by Congress itself and that § 505 offends Article III insofar as it permits a citizen to seek and obtain judgment for penalties without any personal stake in their recovery.

In an opinion by Chief Judge Winter, the Fourth Circuit disagreed with both contentions. It found the Railey affidavit sufficient to establish injury stemming from Simkins' past violations. App. 6a-7a. On the Article III "redressability" question, the Fourth Circuit advanced the thesis that the deterrent effect of penalties

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[3] Unlike Simkins, Sierra Club filed no post-judgment motion. It did not seek reconsideration of the Court's failure to grant injunctive relief.

[4] This Court has adopted a three-part test of Article III standing: "[A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant,' and that the injury 'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472 (1982) (citations omitted).

is sufficient of itself to confer standing upon citizens to sue for their recovery, even if such penalties are concededly payable only to the United States Treasury. App. 8a.

In addition, the Fourth Circuit was obliged to reconcile the judgment for penalties, based on Simpkins' past violations of its permit, with the collapse of its own precedent on which that judgment was predicated. *Chesapeake Bay Foundation v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304 (4th Cir. 1986) (opinion per Winter, C.J.), vacated 484 U.S. ——, 108 S.Ct. 376 (1987). The present case was argued prior to this Court's decision in *Gwaltney*, but the Fourth Circuit refused to remand the case for further findings of fact. The Fourth Circuit held "as a matter of law" that Sierra Club had alleged "in good faith" and had also proved a continuing violation within the meaning of *Gwaltney*. App. 8a-9a.

As a pleading matter, the Fourth Circuit focused exclusively on the pre-suit 60-day notice letter in support of its conclusion that "Sierra Club alleged in good faith a continuing violation of the Clean Water Act." App. 9a. It did not address Simkins' argument that the letter described a state of affairs that had existed on August 31, 1984, but did not purport to cover events happening when suit was filed 60 days thereafter. The jurisdictional allegation of the complaint filed October 31, 1984, merely asserted that Simkins "has violated" its permit (App. 74a). The allegations of the complaint were not mentioned in the opinion below.

As a matter of proof, the Fourth Circuit questioned the accuracy of the pre-suit DMRs filed by Simkins. App. 10a. It did not acknowledge the District Court's finding that Simkins, after filing pre-suit DMRs on October 1, 1984, has remained in compliance by continuing to file all DMRs required by its permit. App. 51a. "More significantly", according to the opinion below (App. 10a),

Simkins also violated its permit when it failed to maintain records of monthly monitoring activities prior to September 30, 1984—although no such "record retention" violation was charged in the 60-day notice or the complaint and was admittedly not considered by the District Court. App. 10a n.7. The Fourth Circuit did recognize that Simkins' violations "occurred solely before Sierra Club filed suit," (App. 11a), but it held that such "violations continued past the date Sierra Club filed its complaint" and thus supported § 505 jurisdiction under *Gwaltney*. App. 11a.[5]

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[5] Finally, the Fourth Circuit concluded that the reporting condition of a permit constitutes "an effluent standard or limitation", alleged violation of which is a § 505 jurisdictional prerequisite. App. 12a. It relied upon *dicta* (but not the holding) in *Menzel v. County Util. Corp.*, 712 F.2d 91 (4th Cir. 1983) and the text of 33 U.S.C. § 1365(f)(6), which specifies the types of effluent limitations deemed to be "under this Act" for citizen suits but does not alter the meaning of "effluent limitation" set forth in § 1362(11). Schwartz & Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES LAW. 327, 336 (1984). The Fourth Circuit rejected contentions that § 1365(f)(6) does not encompass all permit conditions, but refers to the effluent "standards or limitations *as translated into the conditions of an NPDES permit.*" *E.P.A. v. California*, 426 U.S. 200, 223 (1976) (court's emphasis). *See Sierra Club v. Shell Oil Co.*, 817 F.2d 1169, 1173 (5th Cir. 1987). Under the construction urged below, a citizen suit may enforce "an effluent standard or limitation" in a permit, but would not encroach upon federal enforcement under 33 U.S.C. § 1319(a) of reporting and other permit conditions implementing § 1318—a provision nowhere mentioned in the citizen suit statute.

With its singular focus upon paperwork violations, the decision below is strangely at odds with the requirement that a citizen must allege "a reasonable likelihood that a past polluter will continue to pollute in the future." *Gwaltney of Smithfield v. Chesapeake Bay Foundation, Inc.*, 484 U.S. ——, 108 S.Ct. 376, 381 (1987). By its unique construction, the Fourth Circuit has arguably expanded citizen suit jurisdiction beyond the reach of § 505. Because no other court has adopted that construction, we reserve further argument for briefing in the event that the writ of certiorari is granted on the other questions presented.

REASONS FOR GRANTING THE WRIT

I. Section 505 of the Clean Water Act Abridges the Article III Requirement of "Redressability" By Authorizing Private Citizens to Seek a Judicial Award of Penalties to the United States Treasury.

The Clean Water Act contains a novel feature distinguishing it from every other statute previously enacted by Congress. In providing for citizen suits, § 505(a) of the Act authorizes a private citizen suing "on his own behalf" to invoke federal jurisdiction to impose civil penalties payable exclusively to the United States Treasury. 33 U.S.C. § 1365(a). Invoking that provision, Sierra Club sought and obtained judgment for $977,000 in penalties but lacks any stake in their recovery. The United States, whose stake is uncontestable, was not a party to the suit. Nevertheless, in upholding the penalty judgment, the Fourth Circuit perceived in Article III of the Constitution no impediment to the standing of a private citizen to seek judicial relief beneficial only to the Treasury. App. 8a.

However, Article III "is every bit as important in its circumscription of the judicial power of the United States as in its granting of that power * * *." *Valley Forge Christian College v. Americans United*, 454 U.S. 464, 476 (1982). "Our cases recognize that a mere showing of personal injury is not sufficient to establish standing; we have also required that the injury be 'fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief'." *Meese v. Keene*, 107 S.Ct. 1862, 1869 (1987), quoting from *Allen v. Wright*, 468 U.S. 737, 751 (1984).

The function of "the 'redressability' component is to focus on the requested relief." *Allen v. Wright*, 468 U.S. 737, 753n.19 (1984). When the requested relief consists of penalties payable to the Treasury, for general expenditures unrelated to the environment, the focus reveals an

inescapable question of fundamental constitutional magnitude. A citizen who sues on his own behalf for penalties, which he is not entitled to share, cannot demonstrate "that he personally would benefit in a tangible way from the court's intervention." *Warth v. Selden*, 422 U.S. 490, 508 (1975). Standing requires "a substantial likelihood that the judicial relief requested will prevent or redress the claimed injury to satisfy the 'case or controversy' requirement of Art. III." *Duke Power Co. v. Carolina Envir'l Study Group, Inc.*, 438 U.S. 59, 79 (1978). "The necessity that the plaintiff who seeks to invoke power stand to profit in some personal interest remains an Art. III requirement." *Simon v. Easton Kentucky Welfare Rights Org.*, 426 U.S. 26, 39 (1976).

This case presents the "redressability" question which inquires whether Congress exceeded the constraints of Article III when it allowed citizens to sue on their own behalf for penalties payable to the Treasury.[6] When the Clean Water Act was enacted, Congress plainly intended to expand citizen standing to the full extent permitted by Article III. It defined a "citizen" broadly "as a person or persons having an interest which is or may be adversely affected." 33 U.S.C. § 1365(g). It is clear "that this phrase was intended by Congress to allow suits by all persons possessing standing under this Court's decision in *Sierra Club v. Morton*, 405 U.S. 727 (1972)." *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981).

Section 505 was thus adapted to *Morton* (but not later decisions) and was patterned upon a citizen suit provi-

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[6] Legal commentators agree that this question remains unresolved. See, e.g., Thompson, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656, 1678 (1987); Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 938-39 (1985); Schwartz & Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES LAW 327, 332-35 (1984).

sion in the Clean Air Act, 42 U.S.C. § 7604(a), which provides for injunctive relief only. *Middlesex County*, 453 U.S. at 18 n.27. Congress took a drastic step beyond those models when it authorized penalties to be assessed in § 505 suits while denying citizens any right in their recovery or disposition. The legislative history does not explain this significant aberration,[7] except that Congress did intend "that any penalties imposed would be deposited as miscellaneous receipts and not recovered by the complainant".[8] Indeed, Congress considered and specifically rejected the option of allowing citizens to collect a share of the penalties.[9] Citizens were not authorized to recover damages either. *Middlesex County*, 453 U.S. at 14.

The effect of § 505 is to deputize "private attorneys general" able to invoke federal jurisdiction to impose penalties but lacking any personal stake in their assessment or recovery:

> * * * The citizen plaintiff's role is to assert permit violations and to request that a fine be imposed; *the citizen does not personally benefit from bringing the action.* * * * "The [citizen plaintiffs in a Clean

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[7] Commentators have noted a lack of congressional discussion of the reasons for allowing citizens to sue for penalties. See, e.g., Thompson, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656, 1669 n.65 (1987); McKinney, *Statute of Limitations for Citizens Suits Under the Clean Water Act*, 72 CORNELL L. REV. 195, 200 n.8 (1986); Schwartz & Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES LAW. 327, 331 (1984).

[8] S. REP. No. 414, 92d Cong., 1st Sess. 79, *reprinted in* 1972 U.S. CODE CONG. & AD. NEWS 3668, 3745. This Court has twice noted that any penalties recovered in a citizen suit are payable to the United States Treasury. *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. ——, 108 S.Ct. 376, 379 (1987); *Middlesex County*, 453 U.S. at 14 n.25.

[9] 1 A LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 221-21 (1973) (remarks of Sen. Bayh).

> Water Act suit] are suing as private attorneys general and they seek the enforcement of federal law. Although the statute provides that a citizen sues 'on his own behalf', *any penalties recovered from such an action are paid into the United States Treasury.* Unlike in a *qui tam* action, where a volunteer plaintiff can recover part of the penalty, *in this action a plaintiff recovers nothing.* Any benefit from the lawsuit, whether injunctive or monetary, inures to the public or the United States. The citizen suit provision was designed to supplement administrative enforcement, *not to provide a* private remedy. * * * "

Sierra Club v. Chevron U.S.A., Inc., 834 F.2d 1517, 1522 (9th Cir. 1987) (italics added), quoting from *Chesapeake Bay Found. v. Bethlehem Steel Corp.*, 608 F.Supp. 440, 449 (D.Md. 1985).

Given the recent and well-documented "explosion" of citizen penalty suits under § 505,[10] the important but unresolved question of Article III "redressability" should be addressed by this Court. The lack of a controlling decision engenders a serious paradox in the administration of justice. Precisely because Congress denied citizens a personal stake in the penalties assessed in § 505 suits, the prospect of huge awards earmarked for the Treasury serves as a powerful incentive for private parties to divert claimed penalties to uses unauthorized by Congress. Citizen suits typically begin with demands for maximum penalties at the outset, but end in settlements requiring the defendant to donate sums to an environmental project designated by the citizen-plaintiff, in preference to having the funds disappear into the Treasury. Consent decrees on such terms are approved routinely by federal courts.

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[10] See, e.g., Thompson, *Citizen Suits and Civil Penalties Under the Clean Water Act*, 85 MICH. L. REV. 1656, 1658-59 (1987); McKinney, *Statute of Limitations for Citizen Suits Under the Clean Water Act*, 72 CORNELL L. REV. 195 (1986); Fodil, *Citizen Suits Against Polluters: Picking Up the Pace*, 9 HARV. ENVTL. L. REV. 23, 34 (1985).

See, e.g., *Friends of the Earth v. Eastman Kodak Co.*, 656 F.Supp. 513, 515 (W.D.N.Y. 1987) ($49,000 paid to private foundation in lieu of penalties to the Treasury). Surveys of consent decrees indicate that citizen suits under § 505 generate more funds for a handful of national environmental groups that is collected by the Treasury on behalf of the taxpaying public.[11] Although Congress recently acted to curtail such abuses,[12] the overarching question remains whether Congress strayed beyond Article III when it empowered citizens to enlist the federal judiciary in forcing payments to the Treasury.

By purporting to confer jurisdiction upon federal courts to impose penalties in citizen suits to which the United States is not a party, Congress has posed that very question. It is undeniable that the "redressability" component of standing is an Article III limitation upon the jurisdiction of federal courts importantly related to the doctrine of separation of powers. *Allen v. Wright*, 468 U.S. 737, 752 (1984); *Valley Forge, supra*, 454 U.S. at 473-74. Congress may not by statute, including § 505, *Gonzales v. Gorsuch*, 688 F.2d 1263, 1267-68 (9th Cir. 1982), authorize a form of judicial relief which does not prevent or redress the citizen's claimed injury:

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[11] This private gain phenomenon is explored in Austin, *The Rise of Citizen-Suit Enforcement in Environmental Law: Reconciling Private and Public Attorneys General*, 81 NORTHW. U.L. REV. 220, 240 (1987); Lewis, *Environmentalists' Authority To Sue Industry For Civil Penalties*, 16 ENVTL. L. REP. 10101, 10102 (1986); Boyer & Meidinger, *Privatizing Regulatory Enforcement: A Preliminary Assessment of Citizen Suits Under Federal Environmental Laws*, 34 BUFFALO L. REV. 833, 932-93 (1985); Schwartz & Hackett, *Citizen Suits Against Private Industry Under the Clean Water Act*, 17 NAT. RESOURCES LAW. 327, 359-60 (1984).

[12] The Clean Water Act was amended in 1987 to provide that consent decrees to which the United States is not a party will not become final until 45 days after the Attorney General and the Administrator have received copies of the decree. Water Quality Act of 1987, Pub. L. No. 100-4, § 504, 1987 U.S. CODE CONG. & ADMIN. NEWS 7, 75, codified as 33 U.S.C. § 1365(c)(3).

> * * * Congress may, by legislation, expand standing to the full extent permitted to Art. III, thus permitting litigation by one "who otherwise would be barred by prudential standing rules." In no event, however, may Congress abrogate the Art. III minima. A plaintiff must always have suffered "a distinct and palpable injury to himself," that is likely to be redressed if the requested relief is granted.

Gladstone Realtors v. Village of Bellwood, 441 U.S. 91, 100 (1979) (citations omitted).

The Article III "redressability" question is no less important because it is capable of evading review. Because consent decrees avoid a judicial assessment of penalties, citizen suits are rarely litigated to final judgment. In fact, during the entire 16-year history of the Clean Water Act, only twice has a penalty judgment in a § 505 suit been subjected to appellate review. Both cases were decided by the Fourth Circuit in panel opinions by Chief Judge Winter. Apart from the present case, the other Fourth Circuit decision was vacated last term in *Gwaltney of Smithfield v. Chesapeake Bay Found., Inc.*, 484 U.S. ——, 108 S.Ct. 376 (1987) (*"Gwaltney"*)

This Court concluded in *Gwaltney* "that citizens, unlike the Administrator, may seek civil penalties only in a suit brought to enjoin or otherwise abate an ongoing violation." 108 S.Ct. at 382. The present case raises the question which *Gwaltney* did not reach. Once a past violation has been abated and injunctive relief is no longer appropriate, does a citizen have Article III standing to procure the assessment of penalties payable to the United States Treasury?

In *Gwaltney*, in sharp contrast to the present case, no standing question was raised in the Fourth Circuit or in the petition for certiorari. Although this Court did not discuss the "redressability" component of standing, the Solicitor General did identify the Article III problem engendered by citizen suits for penalties:

> * * * A citizen plaintiff who alleges that he is adversely affected by a company's ongoing violation of its discharge permit and requests an injunction requiring compliance can satisfactorily demonstrate, *at least at the pleading stage*, both personal injury and redressability. However, a citizen who brings suit to obtain a judicial assessment of civil penalties for nonrecurring past violations would fail to meet Article III's requirements; *the mere assessment of civil penalties, which are payable only to the Treasury, would not redress in a meaningful sense the citizen's alleged injuries.* Cf. *Linda R.S. v. Richard D.*, 410 U.S. 614 (1973). * * *

Brief for the United States as Amicus Curiae in *Gwaltney*, No. 86-473 (Oct. Term, 1986) at 21 n.34 (italics added).

We concur with the Solicitor General, hastening to add that Article III standing is not restricted to the pleading stage but must exist throughout the litigation including appeal. *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986); see *id.* at 551 (dissenting opinion). When injunctive relief is abandoned or becomes moot during litigation, a dependent claim for penalties to the Treasury cannot satisfy the "redressability" component of citizen standing. Cf., *Deakins v. Monaghan*, 108 S. Ct. 523, 529 (1988).

The decision below did not consider the essential nexus between injunctive relief and penalties. It advanced a deterrence rational for upholding the judgment for penalties in the complete absence of injunctive relief:

> * * * [T]he judicial relief of civil penalties, even if payable only to the United States Department of the Treasury, is causally connected to a citizen-plaintiff's injury. Such penalties can be an important deterrence against future violations. Members of Sierra Club must show actual or threatened injury traceable to the wrong and a particularized interest

> in deterring violations of the Act, but once they have done so, the imposition of civil penalties is causally connected to the injury. See *Student Public Interest Research Group, Inc., v. AT & T Bell Laboratories*, 617 F.Supp. 1190, 1200-01 (D.N.J. 1985) (money damages [sic] awarded in Clean Water Act citizen suit made payable to U.S. Treasury did redress plaintiff's injury in the form of general deterrence).

App. 8a (fn. omitted).[13]

The deterrence theory embraced by the Fourth Circuit, without further elaboration [14] owes no allegiance to the decisions of this Court. The *nisi prius* opinion cited below, *Student Public Interest Research Group, Inc. v. A.T. & T. Bell Laboratories*, 617 F.Supp. 1190 (D.N.J. 1985), was never tested by appellate review.[15] Its deterrence rationale is incompatible with Article III precedents for mani-

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[13] In its footnote, the Fourth Circuit found it "interesting to note that Simkins commenced compliance with its reporting obligations under the Clean Water Act shortly *after* Sierra Club notified Simkins in a letter dated August 31, 1984, * * * of its belief that Simkins was failing to comply with permit requirements." App. 8a n.5 (italics added).

By that comment the Fourth Circuit contradicted an express finding of the District Court: "On August 29, 1984, the acting plant manager, Jim Grant, instructed Robert Frey, controller, to see that all applicable state and federal monitoring requirements were complied with." App. 50a. That finding was not challenged on appeal.

[14] The deterrent effect of civil penalties was also stressed in *Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd.*, 791 F.2d 304, 309-10 (4th Cir. 1986) (Winter, C.J.), vacated 108 S.Ct. 376 (1987), in an unpersuasive attempt to justify citizen suits for wholly past violations.

[15] After summary judgment was granted to the citizen-plaintiff on issues of liability, the parties settled the suit for $75,000, only preserving a dispute over attorney's fees for further litigation. *Student Public Interest Research Group of New Jersey, Inc. v. A.T. & T. Bell Laboratories*, 643 F.Supp. 961, 962 (D.N.J. 1986), modified and remanded, 842 F.2d 1436 (3rd Cir. 1988).

fold reasons. First, deterrence rests upon the premise that penalties will force compliance if permittees "know they can be sued for past violations even if they cease discharges or come into compliance with their permits before they are sued." *Id.* at 1200. That premise was surely discredited by *Gwaltney*. Second, the notion "that Congress intended deterrence as a purpose of sanctions" (*id.* at 1201), simply begs the Article III question. Third, even if "the deterrent effect of civil penalties is not a remote possibility" because "the general public will benefit" (*id.* at 1202), that generalized benefit hardly establishes a substantial likelihood that the citizen seeking a penalty assessment "personally would benefit in a tangible way from the court's intervention." *Warth v. Selden*, 422 U.S. 490, 508 (1975).

At bottom, the deterrence theory proves too much. Virtually every major standing question presupposes some claim to judicial relief which, if granted, would "discourage" a forbidden practice by others. See, e.g., *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 25, 42 (1976). If deterrence alone were to satisfy the "redressability" component of standing, then Congress might as readily authorize citizens to initiate or intervene in criminal prosecutions against environmental violators.[16] Of course, it is settled that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another." *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1974) (prosecution of father would not guarantee his child support payments). See also, *Diamond v. Charles*, 476 U.S. 54, 64 (1986) (physician lacks standing to exact compliance with anti-abortion law); *Sure-Tan, Inc. v. N.L.R.B.*, 467 U.S. 883, 897

[16] Congress has attempted to do just that. Under § 505(b)(1)(B) of the Clean Water Act, a citizen may "intervene as matter of right" in any federal civil *or criminal* prosecution of a violator. 33 U.S.C. § 1365(b)(1)(B). See also Deepwater Ports Act, § 16(b)(1)(B), 33 U.S.C. § 1515(b)(1)(B).

(1984) (employers "have no judicially cognizable interest in procuring enforcement of the immigration laws" against aliens in their employ); *Leeke v. Timmerman*, 454 U.S. 83 (1981) (assault victim lacks standing to compel arrest of assailants).

It is possible that citizens and environmental groups might derive satisfaction if violators are stung with large penalties, but that "is not the sort of benefit from which Article III standing is constructed * * *." *Safir v. Dole*, 718 F.2d 475, 480 (D.C. Cir. 1983) (per Scalia, J.). Absent a personal stake in the penalty assessment,[17] the "emotional satisfaction from a ruling" that an adversary's past acts were "wrongful" is not a redressable interest. *Ashcroft v. Mattis*, 431 U.S. 171, 172-73 (1977).

The urgent need for definitive guidance on the contours of Article III redressability, as applied to § 505's authorization of civil penalties in citizen suits, is underscored by recent amendment of other environment measures designed to confer like penalty authority upon private citizens.[18] In spelling out conditions under which citizens may sue for penalties, the *Gwaltney* decision serves to fuel speculation that the "redressability" component of Article III standing is merely a prudential concern and does not apply when Congress allows citizens to stand in the shoes of the Treasury. The decision below reinforces that speculation and deserves review by this Court.

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[17] The ability of a citizen to recover attorney fees and costs in a suit resulting in successful abatement before verdict, *Gwaltney*, 108 S.Ct. at 386 n.6, does not enhance his stake in an award of penalties. See *Diamond v. Charles*, 476 U.S. 54, 70 (1986); *White v. New Hampshire Dept. of Empl. Sec.*, 455 U.S. 445, 452 (1982).

[18] Identical penalty authority was added to citizen suit provisions of the Resource Conservation and Recovery Act of 1984, 42 U.S.C. § 6972(a)(2), and the Comprehensive Environmental Response, Compensation, and Liability Act of 1986, 42 U.S.C. § 9659(c).

II. In Its Review of a Summary Judgment Rendered in Direct Conflict With this Court's Decision in *Gwaltney*, the Court of Appeals Erred by Finding a Continuing Violation of the Act Never Charged by Complaint or Motion and Negated by the Unchallenged Findings of Fact.

This Court's holding in *Gwaltney* discredited the Fourth's Circuit's theory allowing citizen suits under § 505 for wholly past violations of the Clean Water Act. The judgment of the District Court rested entirely upon that repudiated theory, but the Fourth Circuit upheld it anyway.

The Fourth Circuit answered the *Gwaltney* decision by ignoring the complaint and the findings of fact in order to revive its own pre-*Gwaltney* theory of the law. In so doing, it disagreed in principle with the Ninth Circuit decision in *Sierra Club v. Union Oil Co. of California*, 853 F.2d 667, 671 (9th Cir. 1988), that findings of fact by the District Court on the issue of ongoing violations are necessary to support a judgment for penalties.

In its strained attempt to circumvent *Gwaltney* and contrive a "continuing violation" where none existed, the Fourth Circuit could only cite pre-suit paperwork errors as the jurisdictional basis for $977,000 in penalties. It was obliged to rely on forced rationales while refusing to recognize Simkins' immediate, diligent efforts to bring itself into full compliance with its permit as soon as it received 60-day notice. Simkins has remained in compliance ever since. The Fourth Circuit simply ignores basic law that "the purpose of notice to the alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Gwaltney*, 108 S.Ct. at 382-83. The notice achieved the exact purpose of Congress, but the Fourth Circuit disregarded that purpose. Its

cramped reading of *Gwaltney* strips Simkins of the benefit of timely compliance.

In upholding a judgment rendered in direct conflict with *Gwaltney*, the Fourth Circuit saw fit to (1) overlook the defective jurisdictional allegations of the complaint; (2) uphold summary judgment on a ground never presented to the District Court; (3) substitute its appellate views of the record for the unchallenged findings of fact; (4) assess guilt for a violation never charged, and (5) refuse to remand the case for findings of fact responsive to the supervening decision in *Gwaltney*. In each instance, the Fourth Circuit defied the precedents of this Court and created a substantial conflict with decisions from other circuits. The decision below was a veritable explosion of errors, profoundly implicating subject-matter jurisdiction and procedural due process, which invites intervention by this Court.

1. *Defective jurisdictional allegations.* The decision below trivializes the holding in *Gwaltney* that § 505 confers jurisdiction only when the citizen-plaintiffs make "a good faith allegation" of continuing or intermittent violation. *Id.* 108 S.Ct. at 385. The "good faith allegation" must be tested by Rule 11, Federal Rules of Civil Procedure, which requires the *complaint* to be based on a good faith belief that the allegations are "well grounded in fact." *Id.* This Court remanded for a decision "whether respondents' *complaint* contained a good-faith allegation of ongoing violation by petitioner." *Id.* 108 S.Ct. at 386 (italics added).

The Sierra Club complaint, filed October 31, 1984, did not purport to satisfy this jurisdictional requirement. It merely alleged that Simkins "has violated" its permit in the particular specified in a letter dated August 31, 1984, which was incorporated by reference (App. 74a). The

complaint did not allege that the past violations were ongoing.[19]

However, in its opinion below, the Fourth Circuit nowhere mentioned the allegations of the complaint. It relied exclusively upon the recitals in the August letter as having "alleged in good faith a continuing violation of the Clean Water Act." (App. 9a). It refused even to acknowledge the indisputable facts that the August letter (a) described a situation that had existed 60 days prior to filing the complaint and (b) did not constitute a pleading subject to the good faith requirement of Rule 11.

The decision below nullifies the *Gwaltney* pleading criterion. It also contradicts this Court's long-standing insistence that jurisdiction must be distinctly alleged and may not be inferred argumentatively from the pleadings. See, e.g., *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 547 (1986).

2. *Summary judgment.* The decision below, recognizing that a citizen-plaintiff must prove a continuing violation, found it "beyond dispute that Sierra Club proved a continuing violation" within the meaning of *Gwaltney*. App. 9a. However, that issue was *not* submitted to or adjudicated by the District Court. Simkins was never given a chance to dispute that issue.

Having alleged that Simkins' violations consisted of its past failures to file DMRs, Sierra Club moved for summary judgment on the sole ground that Simkins "has violated the Clean Water Act" in that respect (J.A. 68). Sierra Club argued that "[w]e are asking this Court to impose penalties for past violations" (J.A. 89) and that Simkins' present compliance "has no bearing whatsoever on the issue of liability" (J.A. 92). The District Court

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[19] In contrast, the complaint in *Gwaltney* alleged that defendant "has violated * * * [and] will continue to violate its NPDES permit." *Gwaltney*, 108 S.Ct. at 380.

agreed. It granted summary judgment on the ground that Simkins "has failed to file DMRs in the past" and present compliance "is irrelevant to plaintiff's cause of action." App. 39a, 40a.

Gwaltney destroyed the legal basis for the summary judgment. Instead of vacating the judgment, however, the Fourth Circuit upheld it on a different ground neither raised by the motion for summary judgment nor considered by the District Court. The appellate decision that a continuing violation was shown "beyond dispute" injected on appeal "a new issue as to which the opposite party had no opportunity to present a defense before the trial court." *Fountain v. Filson*, 336 U.S. 681, 683 (1949). Indeed, if Simkins had been charged with a continuing violation, it could have developed the record to resist summary judgment on that charge and would have exercised its Seventh Amendment right to a jury decision of that issue. *Tull v. United States*, 107 S.Ct. 1831, 1839 (1987).

The decision below contradicts the *Fountain* holding that it is erroneous to deprive a party opposing summary judgment of an opportunity to dispute the facts material to an issue not presented to the trial court. *Fountain*, 336 U.S. at 683. In addition, summary judgment may not be granted or affirmed on a ground raised for the first time on appeal. Recent decisions of other circuits so hold.[20] The decision below stands in direct conflict with those holdings.

3. *Appellate factfinding.* This case seriously questions the authority of an appellate court, subject to Rule 52(a) of the Federal Rules of Civil Procedure, to find a continuing violation where none was charged or found in the District Court. Faced with a judgment hopelessly at

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[20] See, e.g., *John Deere Co. v. American National Bank*, 809 F.2d 1190, 1192 (5th Cir. 1987); *McBride v. Merrell Dow & Pharmaceuticals, Inc.*, 800 F.2d 1208, 1212 (D.C. Cir. 1986); *Williams v. City of St. Louis*, 783 F.2d 114, 116 (8th Cir. 1986).

odds with *Gwaltney* as a matter of law, the Fourth Circuit disregarded the trial judge's finding of continuing compliance and weighed the evidence *de novo* in order to conclude that pre-suit violations continued beyond filing of the complaint. App. 10a-11a. Despite this Court's repeated admonitions, the Fourth Circuit chose "to ignore the dictates of Rule 52(a) and engage in impermissible appellate factfinding." *Amadeo v. Zant*, 108 S.Ct. 1771, 1780 (1988).

Simkins was adjudged liable for wholly past violations consisting of failing to file DMRs until it was notified of the violations. As *Gwaltney* teaches, "the purpose of notice to alleged violator is to give it an opportunity to bring itself into complete compliance with the Act and thus likewise render unnecessary a citizen suit." *Id.* 108 S.Ct., at 382-83. During the 60-day period prior to suit, Simkins did everything possible to achieve compliance. Its efforts were recognized in the detailed findings of fact adopted by the District Court after a bench trial on the issue of penalties. App. 46a-53a. Based on the evidence, the District Court found explicitly that "[c]ommencing with the report due in October, 1984, and continuing through the present [July 31, 1986], Simkins has filed quarterly discharge monitoring reports as required by its permit." App. 51a.

The Fourth Circuit completely disregarded these findings. While conceding it "is true that Simkins' failure to sample occurred solely before Sierra Club filed suit" (App. 11a), the Fourth Circuit impugned the compliance finding in two respects. First, it observed that the pre-suit DMRs filed on October 1, 1984, which reported samplings for September, "did not include sampling data for the months of July and August of 1984, and therefore did not include accurate quarterly averages." (App. 10a). However, in submitting proposed findings to the District Court, Sierra Club did not suggest any deficiency in the October DMR or request a finding on the point.

Second, the Fourth Circuit observed: "Simkins did not file a complete DMR until January 15, 1985, almost three months after Sierra Club filed its suit on October 31, 1984." App. 10a. Surely, this is a non-sequitur. Under its permit, Simkins was required to file DMRs on a quarterly basis, e.g., (October 1 to December 31, 1984), but those DMRs were *not* due until January 28, 1985 (J.A. 21). By filing the DMRs on January 15, Simkins was in total compliance for the entire quarter, including the date suit was filed.

Furthermore, any charge of continuing noncompliance was negated by the findings of uninterrupted post-notice compliance. It is significant that the District Court retained jurisdiction of this case for more than two years, without any suggestion of recurring violations of the permit. Even if suit was properly brought initially, the demonstrated compliance initiated prior to suit and continuing thereafter raises an unresolved mootness question. *Gwaltney*, 108 S.Ct. at 386; *Atlantic States Legal Foundation v. Tyson Foods, Inc.*, 682 F.Supp. 1186, 1190 (N.D. Ala. 1988).

What is most disturbing is the Fourth Circuit's drawing of unwarranted inferences from the record, with no mention of the findings of the District Court. Once again, the question "is not whether the Fourth Circuit's interpretation of the facts was clearly erroneous, but whether the District Court's finding was clearly erroneous." *Anderson v. Bessemer City*, 470 U.S. 564, 577 (1985). The Fourth Circuit identified no infirmity in the findings of fact; it ignored them entirely. This was not a viable option:

> * * * If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erron-

> eous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own. * * *

Icicle Seafoods, Inc. v. Worthington, 475 U.S. 709, 714 (1986).

The scope of Rule 52(a) is a basic concern to all federal litigants. If the continuing violation of a permit is thought to raise an "ultimate fact", then the decision below should be reversed summarily on authority of *Pullman-Standard v. Swint*, 456 U.S. 273, 286-87 (1982). If it is regarded as a mixed question of law and fact, then this Court should grant the writ to resolve the substantial conflict of decisions of this Court and among the circuits—a conflict which was carefully identified but not addressed in the *Swint* case. *Id.* 456 U.S. at 289-90n.19. When massive penalties hinge upon little more than appellate factfinding, the proper construction of Rule 52(a) seems all the more imperative.

4. *Uncharged violation.* The Fourth Circuit was evidently unconvinced by its own analysis of the sole violation charged in the 60-day notice and the complaint and adjudicated by the District Court—the wholly past failures to file DMRs required by the permit. Incredibly, the Court seized upon a separate provision in the permit and concluded that "Simkins failed to maintain records of monthly sampling it was obligated to perform prior to September 30, 1984, as required by * * * the record retention provision of its permit." App. 10a.

Because Simkins was never charged with a "records retention" violation at any time before the Fourth Circuit concocted it, without record support, Simkins stands penalized for unalleged misconduct for which no notice

or opportunity to defend was ever provided.[21] It is a shocking abdication of due process to sustain a $977,000 penalty judgment on an appellate finding of a violation not alleged or adjudicated below. No punitive sanction may be imposed in these circumstances. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 767 (1980). Moreover, while upholding Article III standing upon an affidavit averring injury traceable to *reporting* violations, the Fourth Circuit did not explain how Sierra Club acquired standing to enforce a "record retention" provision without alleging its violation.

5. *Refusal to remand.* Finally, the decision below creates an unnecessary conflict in principle with a later decision of the Ninth Circuit. In *Sierra Club v. Union Oil Co. of California*, 853 F.2d 667, 671 (9th Cir. 1988), following its analysis of the *Gwaltney* decision, a panel of the Ninth Circuit noted record evidence of ongoing violations but declined to draw any conclusion because the district court had not made any factual findings on that issue. In *Gwaltney* itself, a different Fourth Circuit panel remanded that case "to the district court for further findings as to whether, on the merits, plaintiffs proved at trial an ongoing violation." *Chesapeake Bay Found. Inc. v. Gwaltney of Smithfield, Ltd.*, 844 F.2d 170, 171 (4th Cir. 1988). In remanding in *Gwaltney*, the Fourth Circuit observed: "While the district court did make subsidiary findings pertinent to this issue, *it did not make a direct finding* as to whether citizen-plaintiffs proved the existence of intermittent or sporadic violations

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[21] Because the "missing records" would merely document wholly past violations, a citizen suit predicated on such violations would bear no relation to current abatement, the sole justification for citizen suits cited in *Gwaltney*, 108 S.Ct. at 382-83. Moreover, the "continuing residual effects" of a permit violation do not transform it into a continuing violation. *Hamker v. Diamond Shamrock Chemical Co.*, 756 F.2d 392, 397 (5th Cir. 1985). In other contexts, the failure to file reports or maintain records does not constitute a continuing violation. See, e.g., *Toussie v. United States*, 397 U.S. 112, 115 (1970).

constituting an ongoing violation." *Id.*, 844 F.2d at 172 (citation omitted; italics added).

The Fourth Circuit all but disowned its *Gwaltney* disposition when it perceived no need at all to remand this case to the District Court for further findings. App. 8a. It conceded: "The district court did *not* consider whether Simkins' failure to maintain records and whether Simkins' failure to file complete DMRs until after Sierra Club filed suit constituted continuing violations of the Act." App. 10a n.7 (italics added). While noting that the District Court had authorized suit for past violations of the permit reporting requirements, App. 8a, the Fourth Circuit perversely disregarded the *direct finding* of continuing *compliance* with those requirements before and after suit was filed.

The *Union Oil* decision underlines the self-contradictory and misguided attempt below to indulge in appellate fact-finding, especially on a sparse record left undeveloped because of misplaced pre-*Gwaltney* reliance upon the past violation theory. *Union Oil* is faithful to the long line of precedents of this Court: "When an appellate court discerns that a district court has failed to make a finding because of an erroneous view of the law, the usual rule is that there should be a remand for further proceedings to permit the trial court to make the missing findings." *Pullman-Standard v. Swint*, 456 U.S. 273, 291 (1982), and authorities cited therein. See also *Amadeo v. Zant*, 108 S.Ct. 1771, 1780 (1988).

The decision below, with its capricious refusal to remand for findings, stands in naked defiance of the rule. Given the "punitive nature of the relief" imposed below, *Tull v. United States*, 107 S.Ct. 1831, 1838 (1987), the Fourth Circuit compounded its unjustifiable disregard of the actual findings by its refusal to permit the District Court to make the "missing" findings.

CONCLUSION

For each of the foregoing reasons, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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October 19, 1988

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1600

SIERRA CLUB,
Plaintiff-Appellee

versus

SIMKINS INDUSTRIES, INC.,
Defendant-Appellant

Appeal from the United States District Court
for the District of Maryland

Herbert F. Murray, District Judge—(CA-84-4018-HM)

Argued November 4, 1987 Decided: May 31, 1988

BEFORE WINTER, Chief Judge, ERVIN, Circuit Judge, and BUTZNER, Senior Circuit Judge.

David F. Albright; H. Thomas Howell (Semmes, Bowen & Semmes on brief) for Appellant; John F. King

(G. Macy Nelson; Anderson, Coe & King on brief) for Appellee.

WINTER, Chief Judge:

Simkins Industries, Inc., (Simkins) appeals from a judgment entered against it in a citizen suit brought by Sierra Club pursuant to § 505 of the Clean Water Act, 33 U.S.C. § 1365. The district court held that Simkins was liable under the Clean Water Act for failing to comply with the terms and conditions of Simkins' National Pollutant Discharge Elimination System (NPDES) permit by failing to file quarterly reports from August 1, 1981, to March 31, 1984, Sierra Club v. Simkins Industries, Inc., 617 F. Supp. 1120 (D. Md. 1985) (granting partial summary judgment on liability), and assessed civil penalties in the amount of $977,000 ($1,000 per day of violation). Simkins argues on appeal that Clean Water Act citizen suits may not be properly founded on such reporting violations and that citizen-plaintiff Sierra Club has not established a continuing violation within the meaning of Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Foundation, Inc., —— U.S. ——, 108 S. Ct. 376, 98 L. Ed. 2d 306 (Dec. 1, 1987). We disagree. We also perceive no merit in Simkins' challenges to Sierra Club's standing; the district court's calculation of civil penalties; and the district court's denial of Simkins' belated motion for recusal. We therefore affirm the district court's judgment on liability and civil penalties.[1]

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[1] Decision in this appeal was stayed pending the Supreme Court's decision in *Gwaltney* (citizen-plaintiff suits pursuant to § 505 of the Clean Water Act may not be based upon wholly past violations), and again stayed by motion of the parties pending ongoing settlement negotiations. Because we now have the benefit of the Supreme Court's guidance in *Gwaltney* and because the parties have reported their inability to reach a settlement, we proceed to decision.

After oral argument, the United States moved for limited intervention to insure that any civil penalties assessed in this action be

I.

The Clean Water Act (Act), 33 U.S.C. §§ 1251 *et seq.* (1982 and West Supp. 1988), originated in the Federal Water Pollution Control Act Amendments of 1972, 86 Stat. 816, "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a). Section 301(a) of the Act, 33 U.S.C. § 1311(a), generally prohibits the discharge of pollutants into navigable waters unless the point source has obtained a permit from the Environmental Protection Agency (EPA). Under a procedure established by Congress in § 402 of the Clean Water Act, 33 U.S.C. § 1342, the EPA Administrator may delegate to a state the authority to administer the NPDES program with respect to point sources in that state, and the source state may set more stringent minimum effluent levels supplanting federal standards. A violation of an NPDES permit, whether issued by state or federal officials, is a violation of the Act exposing the permit holder to liability under § 505 of the Act. *See* Environmental Protection Agency v. California *ex rel.* State Water Resources Control Board, 426 U.S. 200, 205 (1976); 33 U.S.C. § 1342(k).

The State of Maryland is authorized by the EPA to administer the NPDES program for point sources in the State of Maryland. In particular, Maryland issues NPDES permits and is empowered to attach certain terms and conditions to these permits, including sampling and reporting requirements. Section 308 of the Clean Water Act, 33 U.S.C. § 1318, provides that recipients of such permits may be required to establish and maintain records, install monitoring equipment, and perform sampling, § 1318(a)(4)(A). It also authorizes the EPA Administrator or his or her authorized representatives a

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made payable to the United States Treasury. On April 22, 1988, we denied the government's motion without prejudice to another application if future circumstances demonstrate that it is necessary for the government to seek protection of its interests.

right of entry to an effluent source location or to premises where required records or monitoring equipment are kept, § 1318(a)(4)(B). A citizen suit must allege violation of "an effluent standard or limitation," 33 U.S.C. § 1365(a)(1), defined, *inter alia*, to mean "a permit or condition thereof issued under section 1342 . . .," § 1365(f)(6).

In 1981, the Office of Environmental Programs of the Maryland Department of Health and Mental Hygiene issued Simkins a permit pursuant to 33 U.S.C. § 1342 for its paper mill in Catonsville, Maryland, on the bank of the Patapsco River. Simkins' paper mill manufacturers cardboard, and in the course of operation Simkins discharges treated waste from its plant into the Patapsco River. *See* 617 F. Supp. at 1123. The NPDES permit allowing Simkins to discharge this waste was conditioned upon maximum daily and quarterly averages in levels of oil and grease. The permit also required Simkins to monitor at locations near its plant the levels and volume of flow of oil and grease, as well as other effluents such as copper, total organic carbon, and total phenol. The permit required Simkins to sample on a monthly basis and to summarize and file accurate results with the Office of Environmental Programs in quarterly Discharge Monitoring Reports (DMRs). *See* 40 C.F.R. §§ 122.41(*l*)(4)(i); 122.22(b), (d).

It is undisputed that Simkins failed to sample and to file the quarterly DMRs for a period of over two years. The district court heard testimony that the plant manager's supervisor did not regard sampling as a "priority."

The Sierra Club filed its citizen suit on October 31, 1984. It sought declaratory relief, injunctive relief, and civil penalties of $10,000 per day of violation, alleging that Simkins' failure to report constituted a separate violation for each day it occurred. The district court

granted Sierra Club's motion for partial summary judgment, and subsequently fixed civil penalties.[2]

II.

Simkins challenges Sierra Club's Article III standing to sue as a private attorney general seeking enforcement of the Clean Water Act under the Act's citizen suit provisions, 33 U.S.C. § 1365. In its complaint, Sierra Club alleged that health, recreation, aesthetic, and environmental interests of its members were and were going to be adversely affected by Simkins' failure to comply with the terms and conditions of its NPDES permits. Sierra Club submitted the affidavit of member John Railey attesting to his interest, as one regularly using and enjoying the Patapsco River and surrounding land, in preserving the environmental integrity of the river.[3] Simkins

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[2] The district court deferred decision on liability, awaiting our decision in *Gwaltney* as to whether civil penalties under Section 309(d) of the Act, 33 U.S.C. § 1319(d), can be assessed per day of violation. *See* Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., 791 F.2d 304, 314-15 (4 Cir. 1986) (civil penalties may be assessed on a daily basis), *vacated on other grounds*, —— U.S. ——, 108 S. Ct. 376 (1987); § 1319(d) ("shall be subject to a civil penalty not to exceed $10,000 per day of such violation"). The district court then concluded that Simkins' failure to comply with its NPDES permit exposed Simkins to a maximum penalty of $9,770,000, $10,000 for each day of violation, and exercised its discretion in assessing a penalty of $1,000 for each day of violation.

[3] Simkins' suggestion that Mr. Railey's affidavit was too vague to support summary judgment is not well-founded. The affidavit was sufficiently specific to allege Article III injury in stating:

> My interest, use or enjoyment of the Patapsco River and surrounding area includes preserving the health, safety and welfare of the river basin, preserving marine life and water integrity within the river, and eliminating odorous and unsightly illegal pollution. I regularly hike along the river. My activities and interests with respect to the Patapsco River have been adversely affected physically, aesthetically and emotionally

argues that Sierra Club has not shown injury under Article III fairly traceable to Simkins' failure to sample and file DMRs, and that Sierra Club's citizen suit is violative of the Article III requirement that a plaintiff's injury be redressed by the requested relief. We disagree with both contentions.

A.

Sierra Club maintains that its members have been injured by Simkins' reporting violations because they are unable to know the full extent of pollution in the river near Simkins' paper mill. Mr. Railey's articulated interests include aesthetic and environmental interest which can constitute injury in fact. Sierra Club v. Morton, 405 U.S. 727, 734-35 (1972). Of course, Congress' provision for citizens suits does not, in itself, establish Article III standing; Sierra Club must establish that one or more of its members use the Patapsco River and would be adversely affected by its pollution. *See* Sierra Club v. SCM Corp., 747 F.2d 99, 107 (2d Cir. 1984) (to establish standing under § 505 of the Act, Sierra Club required to demonstrate actual injury within the meaning of *Morton*).

John Railey's affidavit adequately establishes injury and the threat of future injury,[4] stemming from both

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by Simkin's [sic] Industries' failure to comply with its NPDES permit and resulting illegal pollution.

Finally, I have an interest in monitoring the discharge of effluents into the Patapsco River.

A. 112. Simkins presents no reason to doubt the truth of Mr. Railey's affidavit. The district court was not presented with such a challenge, and thus did not have occasion to review any evidence underlying Mr. Railey's affidavit. Under these circumstances, we accept as true statements made in the affidavit. *See* Chesapeake Bay Foundation v. American Recovery Co., 769 F.2d 207, 209 n.1 (4 Cir. 1985) (per curiam).

[4] *See* Valley Forge Christian College v. Americans United For Separation of Church & State, Inc., 454 U.S. 464, 472 (1982)

Simkins' failure to report concerning harmful effluents for which its permit contained maximum discharge levels and Simkins' failure to report concerning the levels of other effluents for which it was not subject to discharge limitations. As a result of these violations, information on any harmful level of pollutants in the area of Simkins' plant during this time period is forever lost to environmental planners and policymakers and those who might undertake to remedy the effects of any pollution. Moreover, Simkins' failure to report on levels of harmful effluents subject to maximum discharge limitations threatens Mr. Railey's prospective interest in protecting the environmental integrity of the Patapsco River and curtailing any ongoing unlawful discharges into its waters. The actual injury stemming from reporting and sampling violations, coupled with the threatened injury stemming from failure to report on maximum levels of harmful effluents, establishes injury traceable to Simkins' actions.

B.

Simkins also contends that the Clean Water Act's provision for civil penalties unconstitutionally provides a remedy which does not address the Sierra Club's injury, maintaining that Sierra Club has failed to establish "the causal connection between the alleged injury and the judicial relief requested." Allen v. Wright, 468 U.S. 737, 753 n.19 (1984).

It is true, as the Supreme Court has observed, that Congress' provision for citizen suits in § 1365

> necessarily includes . . . plaintiffs seeking to enforce these statutes as private attorneys general, whose injuries are "noneconomic" and probably noncompensable . . . .

(threatened rather than actual injury can meet minimum Article III standing requirements).

Middlesex County Sewerage Authority v. National Sea Clammers Association, 453 U.S. 1, 17 (1981). However, the judicial relief of civil penalties, even if payable only to the United States Department of the Treasury, is causally connected to a citizen-plaintiff's injury. Such penalties can be an important deterrence against future violations.[5] Members of Sierra Club must show actual or threatened injury traceable to the wrong and a particularized interest in deterring violations of the Act, but once they have done so, the imposition of civil penalties is causally connected to the injury. *See* Student Public Interest Research Group, Inc. v. AT & T Laboratories, 617 F. Supp. 1190, 1200-01 (D.N.J. 1985) (money damages awarded in Clean Water Act citizen suit made payable to U.S. Treasury did redress plaintiff's injury in the form of general deterrence).

III.

Before the Supreme Court's decision in *Gwaltney*, the district court held that the Clean Water Act authorized citizen suits for imposition of civil penalties for past violations. 617 F. Supp. at 1126-27, 1131-32. In a supplemental memorandum filed after the Supreme Court's decision in *Gwaltney*, Simkins contends that *Gwaltney* compels reversal of the district court's decision. On this record, we think that only one conclusion is possible, as a matter of law, as to whether § 1365(a) encompasses this citizen suit, and accordingly neither reversal is indicated nor is there need to remand the case to the district court for further findings. Upon due consideration

[5] The district court was of course not obligated to find that Sierra Club's lawsuit had a specific, immediate deterrent effect in this case in order to find that Article III standing existed. It is, however, interesting to note that Simkins commenced compliance with its reporting obligations under the Clean Water Act shortly after Sierra Club notified Simkins in a letter dated August 31, 1984, pursuant to 33 U.S.C. § 1365(b)(1)(A)(iii), of its belief that Simkins was failing to comply with permit requirements.

of the parties' supplemental memoranda on *Gwaltney*'s application to this appeal, we conclude that Sierra Club has alleged in good faith and proved a continuing violation within the meaning of *Gwaltney*.

In *Gwaltney*, the Supreme Court held that citizen-suits could not be based upon wholly past violations, but distinguished wholly past violations from allegations of intermittent or sporadic violations. On remand from the Supreme Court, we have ruled that while the Supreme Court held that good faith allegations were sufficient to meet threshold jurisdictional challengers, the Supreme Court also stated that in order to prevail, a citizen-plaintiff must prove a continuing violation. *See* Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield, Ltd., —— F.2d ——, No. 85-1873 (4th Cir. April 13, 1988).

At the outset of this lawsuit, Sierra Club alleged in good faith a continuing violation of the Clean Water Act. In a letter dated August 31, 1984, and incorporated by reference in paragraph 14 of plaintiff's complaint, Sierra Club alleged continuing reporting violations of the Clean Water Act. *See* 33 U.S.C. §§ 1318, 1365(a)(1)(A), 1365(f)(6).[6]

It is also beyond dispute that Sierra Club proved a continuing violation of an effluent standard or limitation under 33 U.S.C. § 1365(a)(1)(A). Simkins was required to ample on a monthly basis and maintain records of its sampling activities. The DMR Simkins filed in the

[6] In the August 31, 1984, letter, the so-called sixty-day letter of 33 U.S.C. § 1365(b), the Sierra Club placed Simkins on notice that it believed Simkins "has violated and continues to violate" the terms of the permit, and proceeded to list reporting violations that had occurred to date. Sierra Club of course did not list reporting violation that had not yet occurred and therefore were not known to it. It was sufficient to allege a continuous series of reporting violations coupled with an allegation that Simkins was continuing to violate its permit's terms and conditions.

fall of 1984 did not include sampling data for the months of July and August of 1984, and therefore could not include accurate quarterly averages. Simkins did not file a complete DMR until January 15, 1985, almost three months after Sierra Club filed its suit on October 31, 1984.

More significantly, Simkins was required, as a general condition of its permit, to retain records of its sampling:

> *Records Retention*
>
> All records and information resulting from the monitoring activities required by this permit, including all records of analyses performed, calibration and maintenance of instrumentation, and original recordings from continuous monitoring instrumentation *shall be maintained for a minimum of three (3) years.* This period shall be automatically extended during the course of litigation, or when requested by DHMH [Department of Health and Mental Hygiene].

NPDES Permit No. MD0058033, general condition II (A)(7) (emphasis added). On and after October 31, 1984, the day the Sierra Club filed its citizen suit, Simkins failed to maintain records of monthly sampling it was obligated to perform prior to September 30, 1984, as required by 33 U.S.C. § 1318 and the record retention provision of its permit.[7]

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[7] The district court did not consider whether Simkins failure to maintain records and whether Simkins failure to file complete DMRs until after Sierra Club filed suit constituted continuing violations of the Act. It calculated civil penalties based on reporting violations up until March 31, 1984. Sierra Club has not requested remand for extension of the time period the district court employed for determining civil penalties, and we see no reason, in light of the district court's decision to assess substantially less than the maximum possible civil penalties, to revise the district court's calculations.

It is true that Simkins' failure to sample occurred solely before Sierra Club filed suit, but Simkins' monitoring obligations were not designed to be a mere academic exercise. Simkins was bound by the reporting and records retention requirements of the NPDES permit that are central to adequate administration and enforcement of limits on substantive discharges under the Clean Water Act. Unless a permit holder monitors as required by the permit, it will be difficult if not impossible for state and federal officials charged with enforcement of the Clean Water Act to know whether or not the permit holder is discharging effluents in excess of the permit's maximum levels. Congress has provided that these records be made generally available, with some exceptions, to the Administrator, the public, and to Congressional committees. *See* 33 U.S.C. § 1318.[8] Simkins cannot successfully defend against its failure to file complete DMRs or retain records by noting that the underlying data was never collected in the first instance. In this context, where the permit expressly establishes a continuing obligation to retain records and file complete DMRs, to allow such a defense to jurisdiction would effectively provide a permit holder with the opportunity to escape liability under § 1365(a) by failing at the outset to sample and to create and retain the necessary monitoring records on possibly harmful and unlawful effluent discharge levels.

Because we conclude that Simkins' violations continued past the date Sierra Club filed its complaint, we do not reach the issue of whether they were intermittent or episodic violations which did not cease to be continuous within the meaning of *Gwaltney*.

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[8] Required reports such as DMRs may be used as admissions in court to establish a defendant's liability. *See* Chesapeake Bay Foundation v. Bethlehem Steel Corp., 608 F. Supp. 440, 451 (D. Md. 1985).

IV.

In the district court, Sierra Club successfully maintained that Simkins' undisputed failure to file quarterly DMRs for over thirty consecutive months violated the Act, 33 U.S.C. §§ 1318, 1365. Simkins challenges this holding, arguing that the phrase "an effluent standard or limitation" of § 1365(a) should be construed to exclude citizen suits that do not allege discharge of pollutants in violation of permit limitations. We disagree.

Section 1365 defines an "effluent standard or limitation" to include "a permit or condition thereof issued under section 1342 of this title." § 1365(f)(6). As we said in Menzel v. County Utilities Corporation, 712 F.2d 91 (4 Cir. 1983):

> a discharger that fails to file [DMRs], or fails to file accurate reports, would be in violation of its NPDES permit and would be subject to citizens' suit under 33 U.S.C. § 1365.

Id. at 94; *see also* Pymatuning Water Shed Citizens for Hygienic Environment v. Eaton, 506 F. Supp. 902 (W.D. Pa. 1980) (awarding injunctive relief in citizens suit not alleging dischargers in violation of permit levels), *aff'd*, 644 F.2d 995 (3d Cir. 1981). Simkins' reporting requirements are expressly made conditions of its permit, and therefore violations of these conditions, by operation of § 1365(f)(6), are violations of an effluent standard or limitation of § 1365(a).[9]

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[9] Simkins' efforts to distinguish substantive discharge limitations from reporting requirements therefore fails in light of the plain language of § 1365(f)(6). Its argument is also unpersuasive because, as above, the reporting requirements of the Act and Simkins' NPDES permit are essential elements of the Clean Water Act's enforcement procedures. Sampling data is useful, independent of ascertaining compliance with maximum discharge limitations, to enable goverment officials and others to monitor potentially harmful trends and adjust their future course of action accordingly. *See* 33 U.S.C. § 1318(a)(4)(B) (Administrator shall have access to records at reasonable times); § 1318(b) (records shall be made

V.

Simkins contends that the Sierra Club should be estopped from seeking civil penalties in excess of the approximate cost of an environmental survey, $130,000, which counsel for Sierra Club mentioned at trial. We disagree. Sierra Club requested $10,000 per day of violation in its complaint, and we have held that such daily penalties can be imposed. *See Gwaltney*, 791 F.2d at 313-15. Sierra Club's complaint, not the informal comments of its counsel at trial, constitute the formal request for damages. More importantly, the district court has wide discretion in determining civil penalties which cannot be limited by trial counsel's oral arguments.

Simkins further argues that Sierra Club should be judicially estopped from money damages greater than its purported trial request for only $130,000 in damages because the Sierra Club used this request to prevail in a dispute over the admission of certain expert testimony on the actual level of pollutants in the Patapsco River near Simkins' paper mill. It is not clear that Sierra Club's mention of lower money damages than the civil penalties requested in the complaint or awarded by the district courts is accurately characterized as a formal request to limit the magnitude of civil penalties.[10] It is

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available upon request to the public with limited exceptions); § 1318(d) (records shall be made available upon request to committees of Congress). For example, Simkins' permit required it to collect information on the levels of copper at certain monitoring locations despite the absence of a maximum quarterly, monthly, or daily average on copper in the NPDES permit. At the trial on damages, plaintiff presented evidence of unsafe levels of copper in the river near Simkins' plant.

[10] We are not convinced that Sierra Club counsel sought to limit his client's request for civil penalties by arguing to the district court as follows:

> [Your Honor has] the power, we submit, to assess penalties in the amount of $130,000. We are not asking that. We are only asking that you provide monies . . . for . . . the survey . . . to determine what the impact of this industry's functioning on

clear that the district court did not rule on admissibility of the expert testimony on the basis of Sierra Club's mention of a hypothetical number. The district court properly concluded, in the exercise of its broad discretion as to the admission of evidence, that testimony concerning the actual level of pollutants was relevant to its determination of what penalty should be imposed. Its ruling was not dependent upon the amount Sierra Club mentioned during oral argument as a possible assessment.[11] *See Simkins*, 617 F. Supp. at 1131 (current compliance with Act may be considered in assessing amount of penalties).

VI.

The district judge, Judge Murray, had joined the Sierra Club in 1969, but he resigned in 1971 upon his appointment to the bench, maintaining no further con-

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that river site has been during the period of time they have not reported.

A. 153-54. By way of summation of its admissibility argument, Sierra Club argued that it would be "entirely reasonable for the Sierra Club to ask that the industry *at least* pay that amount . . ." A. 154 (emphasis added). Sierra Club's use of the number $130,000 appears to be not an effort to buy admissibility of its testimony by lowering its money damages request, but rather a hypothetical number used in its argument that the testimony was relevant to the district court's civil penalties determination.

[11] Additionally, Simkins contends that the district court improperly included the first 93 days of the period of noncompliance, arguing that at worst it was in noncompliance with its quarterly reporting requirements beginning October 28, 1981. Simkins' obligations under the NPDES permit extended beyond filing of quarterly reports to the actions necessary to make filing of the DMRs possible, including installation and regular use of sampling equipment and the maintenance of records recording the results of monitoring. The district court found that from the date the NPDES permit was effective, July 27, 1981, Simkins failed from the time the permit was made effective to comply with the permit's specified conditions. Thus the district court did not abuse its broad discretion in finding that the period of noncompliance commenced July 27, 1981.

tact with the organization. Judge Murray's prior association with plaintiff's organization thus ended thirteen years before this case commenced. Judge Murray was commendably forthright in informing the litigants in pretrial conference of his prior membership in the Sierra Club. His ensuing offer to recuse himself from the case was not accepted by Simkins' counsel. Simkins now contends that the district court erred in denying its post-trial motion for recusal, arguing that a reasonable person, knowing reasonably ascertainable facts, would harbor doubts about Judge Murray's impartiality, *see* United States v. Carmichael, 726 F.2d 158, 160 (4th Cir. 1984), and that the district court erred in failing to make its offer of recusal on the record. We conclude that the district court's impartiality may not be fairly questioned in this case and that the court did not err in failing to make its offer of recusal on the record.

A.

We agree with the district court's holding that such prior association does not, in itself, form a reasonable basis for questioning a judge's impartiality. *See* Maier v. Orr, 758 F.2d 1578, 1581 (Fed. Cir. 1985) (trial judge's former association with Air Force does not reasonably raise appearance of partiality); Brody v. President & Fellows of Harvard College, 664 F.2d 10, 11 (1 Cir. 1981) (trial judge's graduation from defendant university does not in itself constitute reasonable basis for recusal motion), *cert. denied*, 455 U.S. 1027 (1982). As the *Brody* court persuasively reasoned, litigants are entitled to a judge free of personal bias, but not to a judge without any personal history before appointment to the bench.

Simkins seeks to distinguish *Maier* and *Brody* on the basis that, unlike the Air Force or a university, the Sierra Club has been "judicially noticed out" as a single-issue advocacy group. The Judicial Conference of the

United States has suggested that judicial officers resign from organizations such as the Sierra Club, the Anti-Defamation League of B'nai B'rith, and the National Association for Advancement of Colored People, as groups which "regularly engage in adversary proceedings" in federal court.[12] However, it does not follow that federal judges who are former members of one of these groups may not preside in disputes in which the group is a party. To the contrary, one can infer that resignation is deemed appropriate in order generally to allow former members to preside in federal court proceedings involving these expansive organizations. We have no difficulty concluding that a brief association with the Sierra Club terminated over a decade before adversary proceedings commenced does not form a basis for reasonably questioning a district judge's impartiality.

B.

Simkins sought recusal through new counsel after an adverse judgment had been entered, arguing that Simkins should not be bound by its former counsel's waiver of Judge Murray's offer of recusal. Simkins presented evidence that its counsel had told it before the pretrial conference that the judge may have been associated with the Sierra Club and that, were this to be the case, counsel would seek the district judge's recusal. Simkins contends that when it heard no more from its former counsel on this matter, it reasonably relied upon counsel's silence as an indication that the judge was not a former member. It argues that its former counsel's alleged error was compounded by the district court's failure to make its offer of recusal on the record.

This line of argument is without merit for two reasons. First, Simkins argument is that it reasonably relied on its former counsel's failure to communicate the

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[12] *See* Judicial Conference of the United States, Advisory Comm. on Judicial Activities, Adv. Op. 40 (Jan. 10, 1975).

fact of the district judge's prior affiliation with plaintiff as an indication that the judge was not a former member. However, Simkins wishes not to be bound by its reliance on its former counsel's tactical decision not to accept the judge's offer to recuse himself. Ordinarily civil litigants are bound by their lawyers' tactical decisions, and we see no reason to depart from this rule in this case. Especially is this so because Simkins' motion for recusal was made after entry of adverse judgment, so that the equities do not militate in favor of Simkins.

Secondly, Simkins' assumption that the district judge was required to offer to recuse himself on the record is incorrect. Subsection 455(e) does provide that acceptance of a litigant's waiver of a § 455(a) offer of recusal must be preceded by a "full disclosure on the record of the basis for disqualification." However, § 455(a) by its terms is applicable only when a judge's impartiality "might reasonably be questioned." As we have said, we do not think the district judge's impartiality may be reasonably questioned on the basis of the trial judge's brief membership in the Sierra Club over a decade before this case was tried. His disclosure of his prior affiliation with plaintiff was therefore not required under § 455(a). It follows that the on-the-record requirement for acceptance of waivers under § 455(e) is not applicable.

Affirmed.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM84-4019

SIERRA CLUB

v.

SIMKINS INDUSTRIES, INC.

Civil No. HM84-4019

SIERRA CLUB

v.

NEUVA ENGINEERING, INC.

Civil No. HM84-4020

SIERRA CLUB

v.

KEYSTONE AUTOMOTIVE PLATING CO.

MEMORANDUM AND ORDER

Plaintiff Sierra Club has filed three citizens' suits pursuant to § 505 of the Clean Water Act, 33 U.S.C. § 1365, against defendants Simkins Industries, Inc., Civil No. HM84-4018 (hereinafter Simkins); Neuva Engineering, Inc., Civil No. HM84-4019 (hereinafter Neuva); and Keystone Automotive Plating Co., Civil No. HM84-4020 (hereinafter Keystone). The complaint in each of the three actions charges the defendant with violating "the

terms and provisions of its National Pollutant Discharge Elimination System (NPDES) permit" in violation of the Clean Water Act, 33 U.S.C. § 1251, *et seq.* Specifically, plaintiff alleges that the defendants' discharge of treated wastes into the Patapsco River pursuant to NPDES permits violates the waste water discharge limits contained in such permits and thus violates § 301(a) of the Clean Water Act, 33 U.S.C. § 1311(a). As relief for the alleged violations, plaintiff seeks a declaratory judgment that defendants have violated the Clean Water Act, 33 U.S.C. §§ 1311 and 1342; an injunction prohibiting defendants from further violating their NPDES permits; a mandatory injunction requiring defendants to provide to plaintiff a copy of all future reports submitted by defendants to the state or federal government regarding defendants' NPDES permits; an assessment of civil penalties of $10,000 per day for each violation against each defendant; and an award of costs, including attorney, witness and consultant fees. Various motions are presently pending before the courts; namely:

(1) Defendant Simkins' Motion for Entry of Judgment on the Pleadings;

(2) Defendant Neuva's Motion to Dismiss and/or Motion for Judgment on the Pleadings;

(3) Defendant Keystone's Motion to Dismiss;

(4) Plaintiff's Motions for Partial Summary Judgment as to each defendant;

(5) Plaintiff's Motion for Leave to File Amended Complaint; and

(6) Defendant Neuva's Motion for Continuance.

The court held a hearing on these motions on May 3, 1985, and has reviewed the memoranda submitted and is now prepared to rule.

Background

Plaintiff Sierra has brought these actions against defendants Simkins, Neuva and Keystone pursuant to the citizen suit provision of the Clean Water Act, 33 U.S.C. § 1365. That provision provides:

> (a) Except as provided in subsection (b) of this section, any citizen may commence a civil action on his own behalf—
>
> > (1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of (A) an effluent standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation, or
> >
> > (2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator.
>
> The district court shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an effluent standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be and to apply any appropriate civil penalties under section 1319(d) of this title.

This court, per Judge Young, has recently discussed the statutory scheme of the Federal Water Pollution Control Act (hereinafter the Clean Water Act or the Act), 33 U.S.C. § 1251 *et seq.*, in *Chesapeake Bay Foundation, et al. v. Bethlehem Steel Corporation*, Civil No. Y84-1620, pp. 4-6 (D. Md. May 6, 1985), and will not repeat it herein. Relevant portions of the Act having bearing on the issues at bar will be discussed where appropriate.

As required by § 505(b)(1)(A) of the Act, 33 U.S.C. § 1365(b)(1)(A), plaintiff gave notice on Aug. 31, 1984, of the alleged violations and of its intent to file suit, to the Administrator of the United States Environmental Protection Agency; to the Regional Administrator, Region 3, United States Environmental Protection Agency; to the Assistant Secretary of Environmental Programs, Department of Health and Mental Hygiene; to the Director of Water Management Administration, Office of Environmental Programs; and to the defendants herein. After the lapse of 60 days from plaintiff's giving of notice and after neither the Environmental Protection Agency (hereinafter EPA) nor the state commenced prosecution to redress the alleged violations, plaintiff brought the instant actions.

Plaintiff Sierra Club is a national, non-profit corporation with its principal place of business in San Francisco, California and with members in the Chesapeake Bay area. It is a public interest organization dedicated to protecting and conserving natural resources. Defendant Keystone, a corporation organized under the laws of the State of California, operates a business consisting of repairing damaged automobile bumpers. Defendant Simkins, a corporation organized under the laws of the State of Connecticut, operates a papermill which manufactures cardboard. Defendant Neuva, a corporation organized under the laws of the State of Maryland, operates a business consisting of the engineering, manufacturing and sale of electronic systems, components and equipment. Each of the defendants discharges treated wastes from its operations into the Patapsco River pursuant to NPDES permits issued by the Maryland Department of Health and Mental Hygiene, Office of the Environmental Programs, and authorized by the Administrator of the EPA under § 402(a)(b) of the Act, 33 U.S.C. § 1342 (a)-(b).

The instant actions against defendants charge that defendants have violated the waste water discharge lim-

its of their NPDES permits in violation of § 301(a) of the Act, 33 U.S.C. § 1311(a). Plaintiff also charges the defendants with failure to report in violation of the act. Each defendant has moved to dismiss the actions on various grounds. Plaintiff has moved for partial summary judgment as to liability. The court will now examine each of these motions.

I. *Sierra Club v. Keystone Automotive Plating*

Presently pending before the court in the above-captioned case are plaintiff's Motion for Leave to File Amended Complaint, Defendant's Motion to Dismiss, and Plaintiff's Motion for Partial Summary Judgment. A discussion of each motion follows.

A. *Plaintiff's Motion for Leave to File Amended Complaint*

Plaintiff files the instant motion requesting the court to grant it leave to file an amended complaint. In support of the motion, plaintiff contends that since it filed its original complaint charging defendant Keystone with violations of the Clean Water Act between April 1, 1976 and September 20, 1983, it has discovered additional violations of the Act by defendant occurring between October 1, 1983 and June 30, 1984. The amended complaint, in essence, only differs from the original complaint in that it alleges additional violations of the Act. Plaintiff thus requests that all of the alleged violations be tried together in the interest of judicial economy. Defendant Keystone has not filed opposition to the motion.

Rule 15 of the Federal Rules of Civil Procedure permits a party to amend his pleading by leave of the court and requires the court to grant such leave to amend when justice so requires. The court believes that justice and judicial economy, in the instant case, mandate permitting plaintiff to amend its complaint in light of the similarity of the issues and parties. There is no reason

to subject identical parties to separate trials regarding the same alleged permit violations. Plaintiff's Motion for Leave to File Amended Complaint is therefore *Granted.*

B. *Defendant's Motion to Dismiss*

Defendant Keystone initially filed its Motion to Dismiss on January 16, 1985. However, in response to plaintiff's Motion for Leave to File Amended Complaint filed on February 4, 1985, defendant Keystone filed a second Motion to Dismiss on February 27, 1985. Defendant Keystone seeks dismissal of the complaint pursuant to Rule 12(b) of the Federal Rules of Civil Procedure. Rule 12(b) permits dismissal for failure to state a claim upon which relief can be granted. Dismissal is not proper, however, unless it appears beyond doubt that plaintiff can prove no set of facts in support of its claim which would entitle it to relief. *See Jenkins v. McKeithen*, 395 U.S. 411, 422 (1969); *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). The court will now turn to examine defendant Keystone's grounds for dismissal in light of these principles.

1. Statute of Limitations

In support of its Motion to Dismiss, defendant asserts that the one-year statute of limitations provision set forth in § 5-107 of the Courts and Judicial Proceedings Article of the Maryland Annotated Code applies in the instant case and bars 403 of Sierra's 453 claims that defendant violated its permit between April 1, 1976 and June 30, 1984. Keystone claims that 403 of the alleged permit violations are time-barred because they occurred more than one year prior to the filing of the suit by plaintiff. Keystone asserts also that 50 of the alleged violations occurred within the year prior to the filing of the suit and, therefore, are not barred by the statute of limitations; however, only 8 of the 50 concern allegedly illegal discharges for which relief may be sought. *See*

Memorandum in Support of Motion to Dismiss, pp. 6, 9-10. Alternatively, Keystone argues that if the court finds the one-year statute is inapplicable, then Maryland's three-year statute of limitation applicable generally to civil actions would govern plaintiff's claim. *Id.* at 11.

In opposition to defendant's Motion to Dismiss, Sierra argues that 28 U.S. § 2462, the statutory period applicable in government actions to recover civil penalties, applies to the citizen suit provision of the Clean Water Act. Plaintiff argues that because it is seeking the same relief as would the government, specifically, civil penalties for past violations and future compliance, the same statute of limitations should apply to plaintiff's action as would apply to an action by the government. Because the interest of the government and plaintiff citizen are identical, plaintiff contends that the five-year statute of limitations, as set forth in 28 U.S.C. § 2462, is applicable and not the state statute of limitations as urged by defendants. Plaintiff's Memorandum in Opposition to Defendant's Motion to Dismiss, pp. 3-5.

The issue before the court is whether, in the absence of a limitations provision in a federal statute, a federal court should apply the analogous state statute of limitations or a federal statute of limitations to a citizen suit instituted under § 505 of the Clean Water Act. This court recently has decided this precise issue.

On April 30, 1985, Judge Young of this court, in *Chesapeake Bay Foundation v. Bethlehem Steel Corporation*, Civil No. Y84-1620 (D. Md. May 6, 1985), held that 28 U.S.C. § 2462 applies to citizen suits for civil penalties as well as government actions for penalties under the Clean Water Act.[1] The court noted that where

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[1] 28 U.S.C. § 2462 provides:

Except as otherwise provided by Act of Congress, an action, suit or proceeding for the enforcement of any civil fine, penalty

a federal statute fails to provide a limitations period, federal courts generally apply the period of limitations most appropriate under state law; however, where application of a state statute would frustrate a federal policy underlying the cause of action under consideration, the general rule concerning application of an appropriate state statute of limitations should not apply. *Chesapeake* at 15-16, 17 (*citing Johnson v. Railway Express Agency*, 421 U.S. 454, 462, 465 (1925)). The court reasoned that application of a state statute of limitations would frustrate several policies of the Clean Water Act because such application would produce non-uniform citizen suit enforcement from state to state and would also produce non-uniform enforcement as between citizens and the government. *Chesapeake*, at 18-22. The court then ruled that even though 28 U.S.C. § 2462 was designed to apply to suits brought by the government, the five-year limitations period set forth in the statute is equally applicable in a citizen suit for civil penalties under the Clean Water Act. The court reasoned:

> The plaintiffs are suing as private attorneys general, and they seek the enforcement of federal law. Although the statute provides that a citizen sues "on his own behalf," any penalties recovered from such an action are paid into the United States Treasury. . . . [I]n this action a plaintiff recovers nothing. Any benefit from the lawsuit, whether injunctive or monetary, inures to the public or to the United States. The citizen suit provision was designed to supplement administrative enforcement, not to provide a private remedy. Under these circumstances it seems most appropriate that the same

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or forfeiture, pecuniary or otherwise, shall not be entertained unless commenced within five (5) years from the date when the claim first accrued if, within the same period, the offender or the property is found within the United States in order that proper service may be made thereon.

statute of limitations applies to a citizen action as to a federal administrative action. *Chesapeake* at 24-25. *Accord Friends of the Earth, et al. v. Facet Enterprises, Inc.*, Civil No. 84-357T (W.D. N.Y. Dec. 28, 1984). *Compare Chesapeake* and *Friends of the Earth, supra,* (applying five-year federal statute of limitations found in 28 U.S.C. § 2462) *with Student Public Interest Research Group of New Jersey, et. al. v. Tenneco Polymers,* 602 F. Supp. 1394, 1398-99 (D. N.J. 1985) (refusing to apply both state statute of limitations and federal statute of limitations).

The court agrees that the five-year federal statute of limitations in 28 U.S.C. § 2462 applies to this instant citizen suit for civil penalties and relies upon the rationale articulated by Judge Young of this court in *Cheaspeake.*[2]

2. Section 505(b)

In further support of its Motion to Dismiss, Keystone asserts that § 505(b) of the Clean Water Act also bars plaintiff's suit because the state has commenced and is diligently prosecuting administrative proceedings against Keystone based upon the alleged violations of Keystone's NPDES permit. Defendant Keystone's Memorandum in Support of Motion to Dismiss, pp. 11-13, 15. In response, plaintiff argues that § 505(b) of the Clean Water Act does not bar the present suit because the state's administrative proceeding was commenced after plaintiff filed its complaint. Plaintiff filed suit on October 31, 1984 and the State of Maryland issued its "Notice of Violation" on December 13, 1984. Moreover, plaintiff asserts that even if the state's action preceded plaintiff's suit, plaintiff's suit still would not be barred because the

[2] The court instructs plaintiff to file a memorandum by August 1, 1985 indicating which claims, if any, are time-barred by the five-year statute of limitations.

state's administrative hearing is not tantamount to a "diligent prosecution" in a court within the meaning of § 505(b). *Id.* at 6-8.

Section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b), provides that no citizen suit can be maintained "if the Administrator or State has commenced and is diligently prosecuting a civil or criminal action in a court of the United States, or a State to require compliance with the standard limitation, or order, but in any such action in a court of the United States any citizen may intervene as a matter of right." Preliminarily, the court notes that it finds the state's administrative proceeding was instituted *after* plaintiff commenced its action. Significantly, plaintiff filed its complaint on October 31, 1984 and the state filed its Notice of Violation on December 31, 1984. Defendant argues that the state's administrative proceeding was instituted two months prior to plaintiff's filing of its Amended Complaint on February 4, 1984. The court finds this argument unpersuasive. The dispositive date is that on which the original complaint was filed, not the date on which the plaintiff sought amendment of the complaint. Plaintiff's suit was instituted prior to the state's institution of administrative proceedings aganst defendant Keystone and, therefore, is not barred by § 505(b) of the Clean Water Act.

Secondly, the court also notes that it does not find the state's administrative proceeding equivalent to a diligent prosecution in a court for purposes of § 505(b) of the Clean Water Act. The court recognizes that under certain circumstances an administrative proceeding may be considered the equivalent of court action and thus bar citizen suits, *see Baughman v. Bradford Coal Co.*, 592 F.2d 215 (3d Cir.), *cert. denied*, 441 U.S. 961 (1979); however, in order to be accorded court status, a state agency must possess the full remedial powers inherent to traditional judicial courts. In the instant case, plain-

tiff seeks a declaratory judgment, injunctive relief, civil penalties and costs. Keystone notes that the state in an administrative proceeding has the power to revoke a discharge permit, impose civil penalties, issue orders requiring corrective action within a specified time and execute a consent order. However, Keystone also notes that the state agency may only seek injunctive relief *from a court.* Defendant Keystone's Memorandum in Support of Motion to Dismiss, p. 14. The state agency, therefore, does not possess the full remedial powers available to a court but must seek the injunctive relief plaintiff requests in a court. The state court proceeding possibly may be inadequate to fully protect the plaintiff herein and therefore would not be so diligent as to preempt the citizen suit. The court thus believes that it would not be appropriate to denominate the state agency as a court within § 505(b) and, accordingly, will not bar plaintiff's suit. *Cf. Student Public Interest Research Group of New Jersey, Inc. v. Monsanto Company,* 600 F. Supp. 1479, 1482 (D. N.J. 1985). *See also Student Public Interest Research Group of New Jersey v. Fritzsche, Dodge & Olcott,* 759 F.2d 1131 (3d Cir. 1985); *Brewer v. City of Bristol,* 577 F. Supp. 519 (E.D. Tenn. 1983).

3. Civil Penalties

Keystone asserts that § 505 of the Act entitles Sierra as a citizen plaintiff to prospective relief only for continuing violations of the Act and not civil penalties for alleged permit violations occurring prior to the filing of the suit. Defendant Keystone's Memorandum in Support of Motion to Dismiss, pp. 15-19, 27. Plaintiff, in turn, contends that the language of the Act, the legislative history of the Act, and court constructions of the Act support the proposition that citizens may recover civil penalties for past permit violations. Plaintiff's Response to Motion to Dismiss, pp. 8-14. Moreover, plaintiff contends that it has sufficiently alleged continuing violations to warrant injunctive relief.

Whether civil penalties for past violations may be awarded in a citizen's suit under the Clean Water Act has not been addressed by this court. However, a number of other federal courts have addressed the issue and have determined that courts, in fact, may assess civil penalties for violations of the Act alleged to have occurred prior to the filing of the case. *See Illinois v. Outboard Marine, Inc.*, 680 F.2d 473, 480-81 (7th Cir. 1982); *Student Public Interest Research Group of New Jersey v. Monsanto*, 600 F. Supp. 1474, 1476-77 (D. N.J. 1985); *Sierra Club v. Aluminum Company of America*, 585 F. Supp. 842, 853-54 (N.D. N.Y. 1984); *Friends of the Earth v. Facet Enterprises*, Civil No. 84-357T (W.D. N.Y. 1984). These courts have rejected defendants argument that plaintiff's recovery should be limited to prospective relief and have conclusively held that § 1365(a) of the Clean Water Act authorizes citizen suits for imposition of civil penalties for past violations. The court agrees with the ruling of these cases and adopts their reasoning in full. The court also notes that it finds the cases cited by defendant in support of its position inapposite because such cases involved the recovery of damages and not the recovery of civil penalties.

For the foregoing reasons, the court finds that defendant has failed to show beyond doubt that plaintiff can prove no set of facts in support of its claim which would entitle it to relief. Defendant Keystone's Motion to Dismiss is therefore *Denied.*

C. *Plaintiff's Motion for Partial Summary Judgment*

Plaintiff seeks summary judgment on the issue of liability contending that defendant has not complied with its NPDES permit. In support of its motion, plaintiff contends that defendant has violated a condition of its NPDES permit and, thus has violated the Act, specifically, §§ 301 and 402 of the Act, 33 U.S.C. §§ 1311, 1342; that plaintiff has standing to bring the instant action;

the defendant has admitted in its DMRs [3] its violations of its NPDES permit for which liability may attach; and that plaintiff is entitled to judgment as a matter of law because no genuine issue as to any material fact about liability exists in light of Keystone's admissions.

In opposition to plaintiff's motion for partial summary judgment, defendant Keystone argues that the majority of Sierra's claims are barred by the applicable statute of limitations; that Sierra's instant proceedings are barred by § 505(b) of the Clean Water Act because the State of Maryland has commenced and is diligently prosecuting Keystone for alleged violations of its permit; and that Sierra is not entitled to the imposition of civil penalties for past permit violations. Moreover, defendant argues that further proceedings by Sierra are barred by the defendant's entry into a consent decree with the state whereby the defendant agreed to remit to the state a penalty in the amount of $10,000 for alleged violations of Keystone's NPDES permit. Defendant further argues that Sierra's claims of permit violations amount to allegations of improper recording or technical violations and not substantive violations by defendant of its NPDES permit. Finally, defendant argues that Sierra has not demonstrated that it has standing to prosecute its claims against Keystone.

Summary judgment is appropriate only if the pleadings "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." The court believes that Keystone's pleadings do not raise material factual disputes and that the law weighs in favor of plaintiff Sierra Club. Both the factual and legal bases for the court's findings are set forth *infra*.

The essential facts in the instant case are uncontroverted. The Maryland Water Resources Administra-

[3] Discharge Monitoring Reports.

tion issued NPDES permit number MD0025046 to defendant in accordance with § 402 of the Act on January 29, 1976. The permit authorizes defendant to discharge limited amounts of the treated waste from its operations into the Patapsco River in accordance with the provisions of the permit. The permit also requires defendant to file periodic Discharge Monitoring Reports (DMRs) indicating the contents and quality of its wastewater discharge. Both Keystone's current NPDES permit and DMRs have been authenticated. The DMRs indicate that Keystone has committed excessive discharges and has failed to report in various instances. Having found no genuine issue as to a material fact, the court will now examine the law bearing on the issue at bar.

As this court stated in *Chesapeake*, "[s]ection 308 of the Act, 33 U.S.C. § 1318, provides that the Administrator of the EPA shall require all NPDES permit holders to monitor their discharges. Permit holders must maintain records of the results of this monitoring and report the results to the relevant state or federal agency in DMR. 40 C.F.R. 122.41(1)(4)(i). Permit holders must certify the accuracy of information contained in their DMRs. 40 C.F.R. 122.22. The DMRs must contain a complete and accurate record of pollutant monitoring by the permit holders. 40 C.F.R. §§ 122.22(d), 122.41(1)(4)(i)." *Chesapeake Bay Foundation v. Bethlehem Steel Corp.*, Civ. No. Y84-1620, p. 29 (D. Md. May 6, 1985). Courts generally have held that reports or records which are required to be kept by law, may be used to establish a defendant's liability. *Chesapeake*, *supra*, at 30; *Student Public Interest Research Group of New Jersey v. Tenneco Polymers*, 602 F. Supp. 1394, 1400 (D. N.J. 1985); *Student Public Interest Research Group of New Jersey v. Fritzsche, Dodge & Olcott*, 579 F. Supp. 1528, 1538 (D. N.J. 1984); *Student Public Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1479, 1485 (D. N.J. 1985). Defendant's DMRs in the instant case indicate that defendant has violated its NPDES permit by ex-

ceeding its permit limitations and by failing to report. "[T]o violate a NPDES permit is to violate the Act." *Chesapeake, supra*, at 29 (*citing Environmental Protection Agency v. State Water Resources Control Board*, 426 U.S. 200, 205 (1976); *Natural Resources Defense Council, Inc. v. Costle*, 586 F.2d 1369, 1374-77 (D.C. Cir. 1977)). "Summary Judgment is appropriate on the issue of liability for violations of the Act." *Student Public Interest Research Group v. Monsanto Co.*, 600 F. Supp. at 1485. The court thus finds that partial summary judgment as to liability is appropriate as a matter of law.

The court finds defendant's opposition to the motion unconvincing and insufficient to raise genuine issues of material fact. As to defendant's arguments that summary judgment is inappropriate because of the state's diligent prosecution against defendant for the alleged permit violations and because the alleged permit violations amount only to technical and not substantive violations of defendant's NPDES permit, the court finds *Student Public Interest Research Group of New Jersey v. Fritzsche, Dodge & Olcott*, 579 F. Supp. 1528 (D. N.J. 1984), worthy of mention. In *Fritzsche*, the court rejected such claims by defendant finding that defendant's claim of diligent prosecution by an agency was relevant only to defendant's Motion to Dismiss and that defendant's argument regarding "technical" permit violations was relevant only to the issue of damages. *Id.* at 1538. The court believes the same reasoning applies in this case. The court also believes that the state proceeding and defendant's entry into a settlement with the state is irrelevant to the case at bar. As discussed *supra*, the instant citizen suit is not barred by the state proceeding and any state investigation, resolution, or negotiation does not affect plaintiff's right to prosecute permit violations. Moreover, the court believes that defendant's characterization of its permit violations as technical and not substantive is unmeritorious. Defendant's DMRs indi-

cate that it has violated its NPDES permit. Enforcement of NPDES permits is based on strict liability. *Student Public Interest Research Group of New Jersey v. Tenneco Polymers*, 602 F. Supp. 1394, 1400 (D. N.J. 1985). The Act thus places a heavy emphasis on accuracy. *See Chesapeake, supra*, at 33. Good faith and improper recording, therefore, are not good defenses.

As to defendant's arguments concerning the applicable statute of limitations and the imposition of civil penalties, the court finds that its earlier discussion is equally applicable in the summary judgment context. Such arguments, therefore, are insufficient to withstand plaintiff's Motion for Partial Summary Judgment.

Finally, as to defendant's claim that plaintiff has not adequately demonstrated that it has standing to prosecute its claims, the court finds such argument equally unmeritorious. In paragraph seven of plaintiff's complaint, plaintiff alleges that "[m]embers of the Sierra Club reside in Maryland, in the vicinity of the Patapsco River, and recreate in, on or near, and otherwise use and enjoy, the Patapsco River and the water system of which it is a part. The quality of the Nation's waters and the waters of the State of Maryland directly affects the health, recreational, aesthetic and environmental interests of Sierra Club's members. The interests of Sierra Club's members have been, are being and will be adversely affected by the failure of defendant, Keystone Automotive Plating Company, to comply with its NPDES permit requirements." Plaintiff has also submitted numerous affidavits from various individual members of the Sierra Club who indicate that their interest and activities with respect to the Patapsco River has been adversely affected physically, aesthetically and emotionally by defendant's failure to comply with its NPDES permit and resulting pollution.

The court is satisfied that plaintiff has sufficiently demonstrated that it has standing to bring this suit.

Allegations of harm to one's aesthetic or recreational interest are sufficient to establish standing to sue. *Sierra Club v. Morton*, 405 U.S. 727, 734 (1972). In the case at bar, plaintiff has alleged that Sierra Club members' aesthetic and/or recreational interests and use of the Patapsco River will be harmed by continued pollution of the river. Other courts have also found that plaintiffs on equal footing with the plaintiff herein have standing to sue. *See Student Public Interest Research Group v. Monsanto Co.*, 600 F. Supp. 1479, 1484 (D. N.J. 1985); *Sierra Club v. Aluminum Company of America*, 585 F. Supp. 843, 844-853 (N.D. N.Y. 1984); *Friends of the Earth v. Facet Enterprises*, Civil No. 84-357T, p. 4 (W.D. N.Y. 1984). Having found that plaintiff was satisfied the *Sierra Club v. Morton* standing requirements, the court finds that plaintiff is a proper party in the instant action.

For the foregoing reasons, the court has determined to grant plaintiff's Motion for Partial Summary Judgment as to liability. A hearing will be scheduled at a later date to determine the appropriate remedies under the Act.

II. Sierra Club v. Neuva Engineering

Various motions are pending before the court in the above-captioned matter. The outstanding motions, a discussion of which follows, are Defendant's Motion to Dismiss and/or Motion for Judgment on the Pleadings, Plaintiff's Motion for Partial Summary Judgment, and Defendant's Motion for Continuance.

A. Defendant's Motion to Dismiss and/or Motion for Judgment on the Pleadings

Defendant files the instant motion seeking relief pursuant to Rule 12(b) of the Federal Rules of Civil Procedure or, alternatively, Rule 12(c). In support of its motion, defendant claims that plaintiff improperly seeks declaratory and injunctive relief and civil penalties for

past violations of defendant's NPDES permit which is not authorized by § 505 of the Act; that plaintiff does not have standing to bring the instant action; that defendant has ceased all operations at the plant which is the subject of plaintiff's complaint and no longer discharges any wastes into the Patapsco River; that the State of Maryland has informed Neuva's counsel that it intends to initiate an action against Neuva regarding the alleged permit violations by Neuva; that plaintiff's claim is barred by the analogous one-year state statute of limitations; and that plaintiff's allegations of fact are insufficient at law to support plaintiff's action under § 505 of the Act. Plaintiff opposes defendant's motion. Plaintiff argues that defendant's Motion to Dismiss should be denied because the permit violations are not barred by the applicable five-year statute of limitations; because the State of Maryland has not commenced and is not diligently prosecuting Neuva for violations of Neuva's permit and, thus, plaintiff's citizen suit is not preempted; because the citizen suit provision of the Clean Water Act provides for the imposition of civil penalties for past permit violations; and because plaintiff has sufficiently demonstrated that it has standing.

The court has addressed each of the arguments advanced *supra* and will not repeat its discussion again. (*See, supra* pp. 6-11, 16-17). Summarily, however, the court finds that the five-year statute of limitations set forth in 28 U.S.C. § 2462 is the applicable statute of limitations in a citizen suit for civil penalties under the Clean Water Act. The court also finds that plaintiff's citizen suit is not barred by § 505(b) of the Act because the state's action or lack thereof does not amount to a diligent prosecution in a court within the meaning of § 505(b). Moreover, the court finds that plaintiff has sufficiently alleged, with supporting affidavits, that it has standing to bring the present action. Finally, the court finds that the Act permits citizens to seek civil penalties

for past permit violations. The fact that Neuva no longer operates the plant in question and no longer discharges refuse into the Patapsco River has no effect on plaintiff's right to prosecute the alleged permit violations. Defendant's actions may indicate that it does not intend to commit future permit violations, but such actions do not null and void plaintiff's cause of action.

B. Plaintiff's Motion for Partial Summary Judgment

Plaintiff files the instant motion pursuant to Rule 56 of the Federal Rules of Civil Procedure. Plaintiff claims that summary judgment as to liability is appropriate because defendant has violated its permit and, thus, has violated the Act; because plaintiff has standing to bring this action; because defendant has admitted its violations of the Act; and because no material facts are in dispute and it is entitled to judgment on the issue of liability as a matter of law. Defendant opposes the motion contending that the pleading and answers to Requests for Admission demonstrate that there exists genuine disputes as to material facts alleged by the plaintiff; that defendant has filed its response to plaintiff's Requests for Admission of Genuiness of Documents in a timely manner, and has not admitted the alleged permit violations; and that the arguments advanced in defendant's Motion to Dismiss present genuine disputes as to material facts.

Preliminarily, for the reasons articulated *supra* in the court's denial of defendant's Motion To Dismiss, the court believes that the arguments advanced in defendant's Motion to Dismiss and adopted in opposition to plaintiff's motion do not raise genuine disputes as to material facts. The court believes, however, that defendant's response to plaintiff's Requests for Admission of genuineness of Documents may raise an issue of fact, but not a material issue. Significantly, Paul Thompson, Regional Chief of the Enforcement Program of the Waste Management Administration of the Department of Health & Mental

Hygiene of the State of Maryland (the state agency in charge of NPDES permits and DMRs), has authenticated copies of defendant's DMRs and NPDES permit filed with the court. The DMRs indicate violations of defendant's NPDES permit. Defendant simply has not admitted the authenticity of its NPDES permit or DMRs but has offered no evidence contradicting its DMRs authenticated by Mr. Thompson. In the absence of contradictory evidence, the court cannot find a genuine issue as to any material fact and finds that summary judgment as to liability is appropriate as a matter of law because of the violations evidenced by the authenticated DMRs.

C. Defendant's Motion for Continuance

Sierra Club v. Neuva Engineering is scheduled for trial on July 15, 1985. Defendant requests the court to continue the trial date because defense counsel Rothwell will be out of the country and, therefore, unavailable to try the case. Plaintiff opposes the motion contending that plaintiff will be prejudiced by a continuation of the trial date and that defendant will not be prejudiced by a denial of the request because defendant is already represented by defense counsel Reed.

The court has considered the argument advanced and has reviewed the court's calendar and has determined to grant defendant's request. The court has rescheduled the trial to begin on Monday September 16, 1985 at 10:00 a.m.

III. Sierra Club v. Simkins Industries

Presently pending before the court in the above-captioned are defendant's Motion for Entry of Judgment on the Pleadings and Plaintiff's Motion for Partial Summary Judgment. A discussion of each motion follows.

A. Defendant's Motion for Entry of Judgment on the Pleadings

Defendant Simkins moves the court to enter judgment on the pleadings in favor of the defendants. In support of its motion, defendant asserts that:

"(a) Plaintiff lacks standing to bring a private action as plaintiff has not alleged that any member of plaintiff suffered an injury in fact stemming from defendant's alleged failure to file past monitoring reports;

(b) The complaint fails to state a claim as it does not allege either a violation of an effluent standard or limitation or a violation of the terms and conditions of the Simkins permit;

(c) Plaintiff's private action before this court has been foreclosed by defendant's prompt satisfaction of the alleged violations set forth in plaintiff's sixty-day letter; and

(d) The relief sought by plaintiff is inappropriate as the request for injunctive relief has been mooted by the absence of a continuing violation, and under such circumstances, courts may not impose civil penalties."

In opposition to defendant's motion, plaintiff argues that Sierra Club has standing to bring this action; that the permit at issue contains an enforceable reporting requirement; that defendant's actions to rectify the alleged violations do not bar plaintiff's claim; and that plaintiff may request the court to impose civil penalties for past failures to report. Plaintiff thus asks the court to deny defendant's motion.

As discussed *supra* page 16, the court again finds that plaintiff has standing to bring the instant action. Both the complaint and the affidavits of individual Sierra Club members are sufficient to show that the interest of Sierra Club members may be adversely affected by defendant's noncompliance with its permit requirements. Such a

showing satisfies the *Sierra Club v. Morton*, 405 U.S. 727 (1972) test and is a sufficient claim on which a cause of action may be maintained.

Secondarily, the court believes that plaintiff may maintain an action against defendant for past violations even if defendant now complies with the terms of its NPDES permit. Defendant's permit requires defendant to file DMRs on a quarterly basis. Defendant's Reply Memorandum in Response to Plaintiff's Memorandum in Opposition to Defendant's for Entry of Judgment, p. 7. Plaintiff charges and defendant admits, that defendant has failed to file DMRs in past. Defendant's failure to file DMRs thus violated its permit requiring such reporting. A violation of a permit requirement is a violation of the Act. Courts generally have held that civil penalties may be recovered in citizen suits for past violations. *Illinois v. Outboard Marine*, 680 F.2d 473 (7th Cir. 1982); *Sierra Club v. The Aluminum Company of America*, 585 F. Supp. 84 853-54 (N.D. N.Y. 1984). That defendant is now complying with NPDES permit is irrelevant to plaintiff's cause of action. Such compliance, however, may be considered in assessing the amount of penalties. For a fuller discussion of civil penalties, *see supra* pp. 11-12.

Defendant urges that the court should read *Hamker v. Diamond Shamrock Chemical Company*, 756 F.2d 392 (5th Cir. 1985) to state for the proposition that the court lacks jurisdiction to entertain a citizens complaint under the Clean Water Act where no allegation of a present violation of an effluent standard is made. The court believes such a reading of *Hamker* is too broad. This broad reading of *Hamker* ostensibly would preclude the court from considering an action in which the polluter stops polluting the day, the hour, or the minute before the suit is filed. The court believes that *Hamker* is more narrowly limited to stand for the proposition that a court lacks jurisdiction to impose penalties for a *single* past violation ended long before the filing of the suit.

In the instant action, defendant is not a one-time violator of the Act but a multiple violator of its NPDES permit. In such a case, imposition of civil penalties is appropriate even if defendant is now in compliance with its permit.

Accordingly, for the foregoing reasons, plaintiff has sufficiently stated a claim upon which relief can be granted. Defendant's Motion for Entry of Judgment on the Pleadings is therefore denied.

B. Plaintiff's Motion for Partial Summary Judgment

As plaintiff alleged in its Motion for partial Summary Judgment against defendants Keystone and Neuva, plaintiff again argues that partial summary judgment against Simkins is appropriate because defendant has violated its permit condition and, thus, has violated the Act; that plaintiff has standing to bring this action; that defendant's admissions demonstrate its violations of the Act; and that it is entitled to judgment as a matter of law because no material facts are in dispute. Defendant Simkins opposes plaintiff's motion and contends, as it did in its Motion for Entry of Judgment on the Pleadings, that factual issues are raised by the court's consideration of whether plaintiff has standing; whether plaintiff can maintain an action where the alleged violation consists of a past failure to file state monitoring reports; whether defendant's prompt action to redress the alleged grievances precludes a private suit; and whether plaintiff's claim is barred by the Maryland one-year statute of limitations.

The court has addressed each of these arguments in this memorandum and will not repeat its analysis again. For the reasons set forth *supra*, the court finds that defendant's arguments do not create any material factual disputes.

Significantly, defendant has admitted that it failed to file DMRs as required by its permit prior to receiving plain-

tiff's 60 day letter. Liability attaches for violation of a permit condition whether such violation consists of an excessive discharge or a failure to report. Again, a violation of a permit is a violation of the Act. Summary Judgment as to liability is therefore appropriate.

Accordingly, it is this 18th day of June 1985 by the United States District Court for the District of Maryland,

ORDERED:

(1) that defendant Simkins' Motion for Entry of Judgment on the Pleadings be, and the same hereby is, *Denied*;

(2) that defendant Neuva's Motion to Dismiss and/or Motion for Judgment on the Pleadings be, and the same hereby is, *Denied*;

(3) that defendant Keystone's Motion to Dismiss be, and the same hereby is, *Denied*;

(4) that plaintiff's Motions for Partial Summary Judgment to each defendant be, and the same hereby are, *Granted*;

(5) that plaintiff's Motion for Leave to File Amended Complaint be, and the same hereby is, *Granted*;

(6) that defendant Neuva's Motion for Continuance be, and the same hereby is, *Granted*; and

(7) that the Clerk of the Court provide to all parties in these actions copies of this memorandum and order.

/s/ Herbert F. Murray
United States District Judge

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM84-4018

THE SIERRA CLUB

v.

SIMKINS INDUSTRIES, INC.

MEMORANDUM

Plaintiff Sierra Club has filed the instant citizen suit against defendant Simkins Industries, Inc. (Simkins) pursuant to § 505 of the Clean Water Act (the Act), 33 U.S.C. § 1365. The complaint alleges that defendant has violated the terms and provisions of its National Pollutant Discharge Elimination System (NPDES) permit number MD0058033. Specifically, the complaint alleges that defendant has violated the Clean Water Act by failing to comply with its NPDES permit; that is, by failing to file quarterly discharge monitoring reports (DMRs) with the State of Maryland between August 1, 1981 and March 31, 1984. By Memorandum and Order dated June 18, 1985, the court granted plaintiff's motion for partial summary judgment on the issue of liability finding that defendant Simkins has violated the Act by failing to comply with the terms of its NPDES permit. At issue before the court, therefore, is the appropriate civil penalty to be assessed against Simkins for its violations. Plaintiff argues that Simkins is subject to a maximum penalty of $9,770,000. Conversely, defendant argues

that the court should assess a penalty against it in the range of $10,000 to $20,000.

Both parties have submitted post-trial Proposed Findings of Fact and Conclusions of Law. Defendant also has filed a motion for reconsideration. Having reviewed the record in this case, the court is now prepared to rule.

I. SIMKINS' MOTION FOR RECONSIDERATION

Defendant Simkins moves the court to reconsider its June 18, 1985 order granting plaintiff's motion for partial summary judgment and denying defendant's motion for entry of judgment on the pleadings. In support of its motion, Simkins argue that the pendency of state criminal proceedings against it requires the court to dismiss plaintiff's suit pursuant to 33 U.S.C. § 1365(b)(1)(B). Simkins also contends that upon receipt of plaintiff's notice of intent to sue, Deputy Attorney General Barrett informed counsel for plaintiff that the Maryland Attorney General's office would be proceeding with a criminal investigation of Simkins. Simkins thus argues that in light of the state criminal proceedings, this private suit is barred and must be dismissed.

Plaintiff Sierra Club opposes defendant's motion for reconsideration. Plaintiff argues that its citizen suit is not barred because the State has not commenced an action against Simkins in a court. Plaintiff also argues that a citizen suit is barred only if the State initiates a court action within the statutory sixty-day notice period. Plaintiff thus argues that defendant's motion for reconsideration should be denied because the State did not initiate a court action within the sixty-day period.

Section 505(b) of the Clean Water Act, 33 U.S.C. § 1365(b), provides that no citizen suit can be maintained "prior to sixty days after the plaintiff has given notice of the alleged violation . . . or if the Administrator or State has commenced and is diligently prosecuting

a civil or criminal action in a court of the United States, or a State to require compliance with the standard, limitation, or order . . ." 33 U.S. § 1365(b)(1). Preliminarily, the court finds that the instant citizen suit is proper and should not be dismissed because it was filed after the sixty-day notice period and because the State's criminal investigation is not tantamount to a "diligent prosecution" in a court within the meaning of § 505(b).

The court believes that the state of affairs at the time plaintiff filed this action is dispositive. Significantly plaintiff initiated this citizen suit on October 31, 1984, sixty-one days after giving notice of its intent to sue. Simkins argues that the State informed counsel for plaintiff within the sixty-day period that it would be proceeding with a criminal investigation of Simkins; nevertheless, Sierra Club improperly filed this suit. The court is not persuaded. At the time plaintiff filed this suit, the State had not commenced a court action within the meaning of § 505(b); to be sure, a state investigation is quite distinct from a court action which is being diligently prosecuted. In order for this case to be barred, the State must have filed a court action within the sixty-day period and then diligently have prosecuted the case. *See Brewer v. City of Bristol*, 577 F. Supp. 519 (E.D. Tenn. 1983) ("Timing of pollution abatement efforts is often of critical importance; [r]equiring that the state action be commenced within the 60-day notice period is a strong method of insuring prompt response.") The court believes that to hold otherwise would permit "state agencies and polluters [to] ignore the time requirements of Section 1365(b) by "diligently" prosecuting late actions and thus bar any further citizen participation." *Brewer*, 577 F. Supp. at 528.

The court notes that counsel for defendant states, by affidavit, that he met with Deputy Attorney General Jane Barrett on July 10, 1985 and was informed that "[Ms. Barrett's] investigation had progressed to the point that

she was *intending* to seek a criminal indictment of Simkins Industries." Affidavit of Jack Meyerson, p. 1 (emphasis added). Moreover, Maryland Assistant Attorney General Michael Powell states, by affidavit dated July 1985, that "between August 1984 and the present, the Hazardous Waste Strike Force has proceeded with the Simkins matter and it is anticipated that an indictment will be presented to a state grand jury in late August or early September of 1985." Affidavit of Michael Powell, p. 2. Obviously, any state action was commenced *after* plaintiff filed this case on October 31, 1984. Having found that the State had not commenced a court or an administrative action within the meaning of § 505(b) of the Clean Water Act prior to the commencement of this action, defendant's motion for reconsideration will be denied.

II. CIVIL PENALTIES

Having denied defendant's motion for reconsideration, the court's June 18, 1986 order granting plaintiff's motion for partial summary judgment on the issue of liability is hereby reaffirmed. Again, the court finds that defendant's violation of its NPDES permit conditions is a violation of the Clean Water Act for which defendant may be held liable. *Sierra Club v. Simkins Industries, Inc. et al.*, Civil No. HM 84-4018 (D. Md. June 18, 1985). The court now must decide the amount of civil penalties for which defendant Simkins is liable. Before analyzing the law applicable to this issue, the court will first examine the facts giving rise to the instant action.

A. Findings of Fact

Plaintiff Sierra Club and defendant Simkins have filed Proposed Findings of Fact and Conclusions of Law in this case. The court has determined to adopt in part plaintiff's and defendant's Proposed Findings of Fact, having found that they adequately and fairly represent the facts in this case. The court's factual findings thus

are set forth below incorporating the parties' submissions.

A). BACKGROUND

1. Plaintiff, Sierra Club, is a non-profit national conservationist organization with many members in the Chesapeake Bay area, dedicated to protecting natural resources, including water.

2. Members of the Sierra Club reside in Maryland, in the vicinity of the Patapsco River, and recreate in, on or near, and otherwise use and enjoy the Patapsco River and the water system of which it is a part. The quality of the nation's waters and the waters of the State of Maryland directly affects the health, recreational, aesthetic, environmental interests of Sierra Club's members. The interests of the members of the Sierra Club have been, are being and will be adversely affected by the failure of Defendant, Simkins Industries, Inc. to comply with its NPDES permit requirements.

3. Simkins Industries, Inc. operates a paper mill on River Road, Catonsville, Maryland 21228. (Discharge permit; Frey testimony).

4. The facility was formerly a textile plant. (Frey testimony).

5. The plant in Catonsville is one of 15 plants owned by Simkins Industries, Inc. which are mostly located over the Eastern seaboard. (Plaintiff's Exhibit 11—Defendant's 1984 Annual Report).

6. The Simkins plant manufactures paperboard from waste paper, the bulk of which is collected in the local area. (Frey testimony).

7. The Defendant processes 160 tons off waste paper per day. (Frey testimony).

8. The Defendant produces 3600 tons of paper products a month. (Frey testimony).

9. The Defendant spends approximately $500,000 to $600,000 a year on maintenance at the Baltimore plant. (Frey testimony).

10. The Baltimore plant of Simkins Industries, Inc. draws one million gallons per day from the Patapsco River. (Baisch testimony).

11. The Baltimore plant of Simkins Industries, Inc. discharges approximately 500,000 gallons per day of waste water into the sewer. (Frey testimony).

B). NPDES PERMIT

12. The State issued NPDES permit number MD0058033 to Simkins Industries, Inc.

13. The effective date of the NPDES permit was July 27, 1981. (Defendant's Exhibit 6).

14. The NPDES permit has the following monitoring requirements:

a. Out fall 001—The quarterly average of oil and grease may not exceed 20 mg/1 per liter. The daily maximum discharge of oil and grease may not exceed 30 mg/1 per liter. Simkins must monitor once a month conducting 3 grabs in 45 minutes. There should be no discharge of floating solids or persistent foam in other than trace amounts (Persistent foam is foam that does not dissipate within one half hour of point of discharge.)

b. Out fall 002—There should be no discharge of processed waste. The ph shall not be less than 6.0 nor greater than 9.0 and shall be monitored by grab once per month. There should be no discharge of solids or persistent foam in other than trace amounts. Starting on the effective date of the permit and every year thereafter, the following shall be monitored at out fall 002 and at a point upstream from the factory:

1. Copper

2. TOC [total organic carbons]

3. Total phenol

c. Out fall 003—The ph shall not be less than 6.0 nor greater than 9.0 and shall be monitored by grab once a month. There should be no discharge of floating solids or persistent foam in other than trace amounts. (Defendant's Exhibit 6.)

15. The permit requires Simkins to monitor 3 outflows from its power house and paper producing plant on a monthly basis and to report the results of this monitoring to the Maryland Department of Health and Mental Hygiene, Enforcement Division on a quarterly basis. (Defendant's Exhibit 6). Thus commencing August 1, 1981 through March 31, 1984 Simkins should have filed 11 Discharge Monitoring Reports.

16. Simkins has failed to file quarterly discharge monitoring reports with the State of Maryland between August 1, 1981 and March 31, 1984, the time period for which relief is sought in the complaint. In fact, however, Simkins did not file a DMR with the state until October 1, 1984. (Stipulation of counsel).

C). RECALCITRANCE

17. On February 8, 1983, a state employee filed a report of observations concerning Simkins Industries, Inc. He remarked: "Contacted Mr. Gamber, new plant manager, and reviewed discharge permit requirements, particularly quarterly monitoring reports. Mr. Gamber stated that out fall 002 receives non-contact cooling water from several sources. . . ." (Plaintiff's Exhibit 18).

18. On February 9, 1983, A.D. Gamber, plant engineer for Simkins Industries, Inc. wrote Paul Thompson, Acting Regional Chief Enforcement Program, Waste Management Administration, State of Maryland and stated: "As reviewed with Mr. Miller we will obtain

monthly outfall samples and have them tested as a basis for the quarterly discharge reports." (Plaintiff's Exhibit 15).

19. On May 25, 1983, a state employee, Don Miller, filled out a report of observations concerning Simkins Industries, Inc. He stated: "I contacted Mr. Gamber, plant engineer, for routine inspection. Mr. Gamber stated that he had been contacted by Mike Broumberg concerning past due DMR's. Mr. Gamber stated that he was at fault for not sampling and submitting DMR's. He further indicated that he would start sampling per permit requirements. Mr. Gamber stated that they had had an oil spill recently and consequently had made some changes at the fuel oil storage tanks." (Plaintiff's Exhibit 17).

20. On July 12, 1983, a state employee, Don Miller, filled out a report of observations concerning Simkins Industries, Inc. He stated: "Contacted Mr. Gamber, plant manager. Mr. Gamber stated that he had not implemented a sampling program per DP requirements. He stated that his supervisors did not consider the sampling a priority and requested a meeting with his supervisor." (Plaintiff's Exhibit 19).

21. On September 8, 1983, a state employee, Arthur O'Connell and Mike Griffen filed a report of observations concerning Simkins Industries, Inc. and asserted, among other things: "However, Mr. Gamber told us that no arrangements have been undertaken to sample the out falls as required in the discharge permit." (Plaintiff's Exhibit 23).

22. On July 27, 1983, Paul Thompson, state inspector, issued a site complaint to Simkins Industries, Inc. and asserted: "That the reports and records required by discharge permit No. 80-DB-1779 have not been submitted to the administration. The existence of the above-mentioned violation may subject you to prosecution and penalty. Accordingly, you are advised that the following

corrective actions are necessary to remedy the violation(s). By August 16, 1983, submit to the administration a written report detailing the reasons for non-submittal, request for permit modifications, detail correctional plan and a plan for monitoring record keeping and reporting." (Plaintiff's Exhibit 20)

23. On September 21, 1983, a state inspector, Michael D. Griffen issued a site complaint to A.D. Gamber, plant engineer of Simkins Industries, Inc. Griffen asserted: "No discharge monitoring reports are filed as of this date." (Plaintiff's Exhibit 24).

24. Between August 1, 1981 and October 1, 1984, the senior person at the Simkins plant who was ultimately responsible for the filing of these discharge monitoring reports changed nine times. (Frey testimony).

25. On August 29, 1984, the acting plant manager Jim Grant instructed Robert Frey, controller, to see that all applicable state and federal monitoring and reporting requirements were complied with. (Frey testimony and Defendant's Exhibit 1).

26. Two days thereafter, on August 31, 1984, the Sierra Club mailed a 60 day notice pursuant to 33 U.S.C. § 1365(a)(1) to defendant to the effect that Simkins failed to file discharge monitoring reports from August 1981 through March 31, 1984. The letter was mailed to Leon Simkins, President, Simkins Industries, Inc., P.O. Box 3249, Baltimore, Maryland 21228.

27. The NPDES permit requires that the defendant conduct monthly tests and file a discharge monitoring report (DMR) with the State on a quarterly basis. (See pp. 2, 3, 4, 7 of the permit).

28. The defendant did not conduct monthly tests until September 30, 1984. (See DMRs)

29. The defendant did not file a DMR with the state until October 1, 1984. (Stipulation of counsel).

30. Simkins Industries, Inc. hired Penniman and Browne, Inc. on September 4, 1984. (Defendant's Exhibit 3). Simkins retained a licensed chemist from Penniman and Brown to perform the required monitoring and to prepare the necessary reports to insure compliance with the Simkins NPDES permit.

31. Commencing with the report due in October 1984 and continuing through the present Simkins has filed quarterly discharge monitoring reports as required by its permit. (Frey testimony and Defendant's Exhibit 4).

32. In addition to the preparation of and filing of discharge monitoring reports, between August 1984 and the present, Simkins has spent in excess of $34,000 in implementing a clean water program. (Frey testimony and Defendant's Exhibit 5).

D). PLAINTIFF'S EXPERT TESTIMONY: DAVID A. WRIGHT, Ph.D.

33. David A. Wright, Ph.D., testified for Sierra Club. He had been Assistant Professor, University of Maryland, Center for Environmental and Estuarine Studies, Chesapeake Biological Laboratory, Solomons, Maryland, 20688 since 1979. His area of professional expertise is comparative physiology; effects of inorganic pollutants on marine and estuarine organisms; toxicology. He has authored numerous publications and has presented numerous papers. (See Plaintiff's Exhibit 1—Curriculum Vitae of Dr. Wright).

34. The court accepted David A. Wright as an expert in the fields of toxicology, physiology, with concentration in aquatic environment.

35. David A. Wright expressed the opinion that an environmental survey is necessary because Simkins Industries, Inc. did not file any DMR's with the State between July 27, 1981 and October 1, 1984. The river sediment survey is needed, in his opinion, because no one

knows what the defendant discharged into the river. Should the survey reveal substantial pollution, it will be necessary to clean it up. Pending the survey finding, Dr. Wright could not estimate the cost of clean up, if needed.

36. David A. Wright, Ph.D. recommended ten sampling sites upstream, downstream, at the intake point and at the outtake overflow. He also suggested additional analyses of the sediment for metal, lead, mercury, arsenic and other metals.

37. Dr. Wright recommended a large scale survey to determine what, if any, pollution was in the sediment. Wright suggested a survey of materials in addition to the materials which are identified in the discharge permit. An analysis of this type would allow one to analyze the sediment and look for persistent pollution in the vicinity of the plant. His opinion on the need for a survey is not affected by the fact that the defendant started filing DMR's on October 1, 1984.

38. The survey of the river sediment would cost approximately $52,000. (Plaintiff's Exhibit 10).

39. If the survey is limited to the materials which were identified in the discharge permit, it would cost approximately $26,000.

F). FINANCIAL STATUS AND FINANCIAL SAVINGS OF SIMKINS

40. During the years in question, fiscal 1981 through fiscal 1984, the Simkins Baltimore plant has consistently operated at a loss of between $400,000 and $500,000 annually. (Frey and Baisch testimony).

41. Net sale and operating revenues for Simkins, Inc. and its subsidiaries for 1984 were $133,335,685. Gross profit for 1984 was $18,401,854. Net income for 1984 was $8,000,567. Plaintiff's Exhibit 11—Simkins 1984 Annual Report).

42. Penniman and Browne, Inc. charged Simkins Industries, Inc. $5,030.50 to do the analysis and file discharge monitoring reports with the State between December 1, 1984 and June 1, 1985.

43. After the Sierra Club filed its 60-day letter on August 31, 1984, Simkins spent $34,641.54, (See Defendant's Exhibit 5), in order to come into compliance with State requirements. (Frey testimony).

44. Had the defendant made these improvements on or before July 27, 1981 when its permit became effective, the defendant would have lost the use of $34,641.54 for thirty seven months (approximately $3,400.00 a year on this income for three years). (Frey testimony).

G. PLAINTIFF'S EXPENSES AND COUNSEL FEES

45. David A. Wright, Ph.D. has submitted a bill for $2,187.00.

46. Bruce A. Bell, Ph.D., P.E., has submitted a bill for the *Simkins* case in the amount of $379.91.

47. Plaintiff has submitted a bill for the *Simkins* case exclusively in the amount of $19,336.65. Plaintiff also has submitted a bill in the amount of $10,122.36 for "Sierra Club General," a portion of which is attributable to the *Simkins* case.

B. Maximum Civil Penalty Liability

Section 309(d) of the Clean Water Act, 33 U.S.C. § 1319(d), provides that "any person who violates . . . any permit condition or limitation . . . shall be subject to a civil penalty not to exceed $10,000 per day of such violation. Defendant Simkins' maximum liability in this case thus turns on the number of days during which it violated its permit limitation.

Defendant Simkins stipulates that its NPDES permit provides that the quarterly average of oil and grease

may not exceed 20 mg/1 per liter at outfall 001. *See* Plaintiff's Proposed Findings of Fact and Conclusions of Law, paragraph 15a (underlining by Simkins in blue indicates that Simkins agrees with the statement made). *See also* Defendant's Exhibit 6. Simkins, however, failed to file any DMRs between July 27, 1981 and March 31, 1984 indicating the quarterly averages for oil and grease at outfall 001. Simkins' failure to file quarterly average reports leaves the court without any guidance regarding whether Simkins violated its "quarterly average" permit limitation for oil and grease. Significantly, the United States Court of Appeals for the Fourth Circuit has recently stated that "by requiring permit holders to monitor their discharges and report them through DMRs, . . . the Act itself places on the permit-holder a burden of showing compliance with the permit's limitation. *Chesapeake Bay Foundation, Inc. v. Gwaltney of Smithfield*, Civil No. 85-1873, p. 28 (4th Cir. May 22, 1986). Here, Simkins simply has failed to sustain its burden; it has offered no proof showing its compliance with the permit's quarterly average limitation during the three years it failed to report. Absent proof to the contrary, the court therefore must conclude that Simkins violated its "quarterly average" permit limitation from July 27, 1981 to March 31, 1984.

Having found that Simkins has violated its quarterly average permit limitation, the court must now ascertain the maximum civil penalty for violation of a quarterly average permit limitation by determining the number of days involved in such a violation. The Fourth Circuit held in *Chesapeake* that "for the purpose of fixing an 'appropriate' civil penalty which, pursuant to 33 U.S.C. § 1319(d), may be fixed at a maximum of $10,000 per day of violation, violations of 'average' limitations encompassing periods of greater than one day are to be treated as a violation for each day of the time period involved." *Chesapeake, supra*, at 23-24, 31. In this case,

Simkins violated its quarterly average permit limitation for oil and gas for 11 quarters—from July 27, 1981 to March 31, 1984. There are 977 days in those 11 quarters; therefore, Simkins violated its permit limitation for 977 days. The maximum penalty to which Simkins is subject for those days of violation is $9,770,000 ($10,000 × 977 violations). That Simkins is subject to $9,770,000 in civil penalties for violating a quarterly limitation does not mean that the entire amount of civil penalties must be assessed against Simkins. To be sure, "the [$9,777,000] is a maximum penalty under the statute, not a mandatory one." *Chesapeake Bay Foundation v. Gwaltney of Smithfield*, 611 F. Supp. 1542, 1553 (E.D. Va. 1985).

C. Amount of Civil Penalty

The court now must determine the actual amount of the civil penalty to assess against Simkins in light of the statutory maximum. In making this determination, the court has considered the gravity of the violation, the financial status of the defendant, the possible deterrent effect of this assessment, and the past and present actions of the defendant. Having concluded that defendant's conduct was negligent and should be penalized but not so egregious as to warrant the full assessment of $10,000 per day for each violation, the court has determined that defendant should pay $1,000 for each of its permit violations. In short, the court has determined to assess a civil penalty in the amount of $977,000 against defendant herein ($1,000 × 977 violations). The court believes that this assessment will serve as a sufficient deterrent, will adequately compensate for defendant's past actions, and will protect the interests of all the parties. No further adjustments to this award, either upward or downward, are warranted.

III. PLAINTIFF'S APPLICATION FOR COUNSEL AND EXPERT WITNESS FEES

Plaintiff Sierra Club has filed an application for counsel and expert witness fees. Defendant Simkins has only challenged an entry for March 22, 1985 seeking compensation for 2.3 hours of "research and preparation for seminar" by plaintiff's investigators. This entry has been withdrawn by plaintiff. Simkins also questions whether the time indicated in other entries is excessive.

The court has reviewed the applications for fees and finds them reasonable in terms of time spent and compensation sought. The court therefore will grant plaintiff's application for fees and expenses in the amount of $19,336.65 relating to *Sierra Club v. Simkins* exclusively. The court also will grant plaintiff's application for fees relating to Sierra Club, General, one-third of which is to be paid by Simkins. Finally, the court will grant plaintiff's application for experts' fees in the amount of $2,187.00 as to David A. Wright, Ph.D. and $379.91 as to Bruce A. Bell, Ph.D., P.E.

The court will enter a separate order incorporating the above rulings.

/s/ Herbert F. Murray
United States District Judge

Dated: July 31, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM84-4018

THE SIERRA CLUB

v.

SIMKINS INDUSTRIES, INC.

ORDER

For the reasons outlined in the foregoing memorandum, it is this 31st day of July 1986, by the United States District Court for the District of Maryland,

ORDERED:

(1) that defendant's motion for reconsideration be, and the same hereby is, *Denied*;

(2) that defendant Simkins shall be assessed a civil penalty of $977,000.00 for its permit violations;

(3) that plaintiff Sierra Club be, and hereby is, awarded expert fees, counsel fees and litigation expenses; and

(4) that the Clerk of the Court shall mail copies of this memorandum and order to counsel for the parties.

/s/ Herbert F. Murray
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil No. HM84-4018

SIERRA CLUB

v.

SIMKINS INDUSTRIES

MEMORANDUM AND ORDER

Plaintiff Sierra Club filed the instant suit against defendant Simkins Industries, Inc. ("Simkins") pursuant to Section 505 of the Clean Water Act ("the Act")[1], 33 U.S.C. Section 1365. Sierra Club alleged that defendant failed to file its discharge monitoring reports ("DMR's") with the State of Maryland from August 1, 1981 through October 1, 1984. The National Pollutants Discharge Elimination System ("NPDES") permit which Simkins received required Simkins to file DMRs on a quarterly basis. By Memorandum and Order dated June 18, 1985, the court granted plaintiff's motion for partial summary judgment on the issue of liability, finding that Simkins had violated the Act by failing to comply with this requirement. Trial before the court was held on June 17, 1985, and closing argument was held on July 24, 1985. In a Memorandum and Order, the court assessed $977,000 in damages against defendant.

Pending before the court is Simkins' Motion Pursuant to Rules 52(b), 59(a), 59(b) and 59(e) for Additional

[1] Title 333 U.S.C. 1251 *et seq.*

Finding of Fact, Amendments to Findings of Fact, for Amendments and Alteration of Judgment, and for a Rehearing and a New Trial. Simkins advances three separate grounds for these types of relief. First, Simkins argues that the court's award of damages exceeds the amounts requested by Sierra Club in its complaint. Simkins requests that the court alter the judgment to reflect what it alleges Sierra Club requested. Second, Simkins argues that the court's award was based on an assumption of affirmative and actual pollution, when proof of lack of pollution existed. Simkins requests that the court either alter or amend judgment on this basis or, alternatively, that the court re-open the trial to permit Simkins to give additional proof of non-pollution. Finally, Simkins argues that the court should disqualify itself because of its membership in the Sierra Club prior to assuming the bench. The court conducted a hearing on Friday February 6, 1987. After reviewing the arguments advanced by counsel at the hearing, and the numerous memoranda submitted by the parties, the court has determined that none of the grounds advanced entitles Simkins to the relief requested. Accordingly, the court will deny Simkins' motion for all relief.

Motion for Recusal of Judge Murray [2]

Title 28 U.S.C. Section 455 reads in relevant part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in

[2] Simkins bases its motion on 28 U.S.C. Section 455 and Canon 3C and 3D of the Code of Judicial Conduct. However, when the Judicial Conference adopted the Code in 1973, it explicitly provided that the provisions of the Code did not supersede any less restrictive statutory provisions. S. Rep. No. 93-419, 93d Cong., 1st Sess., 1973, at p. 3. 28 U.S.C. Section 455 was amended in 1974 to adopt Canon 3C. The court will accordingly restrict its discussion, as do the parties, to 28 U.S.C. 455.

> which his impartiality might reasonably be questioned.
>
> . . .
>
> (e) . . . where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is preceded by a full disclosure on the record of the basis for disqualification.[3]

The inquiry is a two-step one, with the issue of effective waiver only arising if there is a reason to question the appearance of the impartiality of the judge.

In the instant case, the court is confident that its impartiality is not in question. The standard is whether a reasonable person, knowing the reasonably ascertainable facts, would harbor doubts about the judge's impartiality.[4] *U.S. v. Carmichael*, 726 F.2d 158, 160 (4th Cir. 1984); *Rice v. McKenzie*, 581 F.2d 1114, 1116 (4th Cir. 1978); *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983); *Chitimacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1165 (5th Cir. 1983); *reh. denied*, 697 F.2d 1092, *cert. denied*, 104 S.Ct. 69. The goal is to foster not only actual impartiality, but also the appearance of impartiality. *Carmichael, supra.*, 726 F.2d at 160. However, when no reason for disqualification exists, the judge is under as much of an obligation to deny a motion for recusal as he or she is under an obligation to grant one when the circumstances warrant. *Maier v. Orr*, 758 F.2d 1578, 1583 (Fed. Cir. 1985) ("absent a factual showing of a reasonable basis for questioning his or her impartiality

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[3] Section 455(b) provides grounds in which a judge must disqualify him or herself, regardless of the appearance. When a judge's disqualification arises because of one of these grounds, there can be no waiver.

[4] The reasonable person standard refers to a disinterested person. "[I]t is not applied from the point of view of the parties, thus making the fears of the parties irrelevant. *Idaho v. Freeman*, 507 F. Supp. 706, 733 (D.Id. 1981).

. . . judges should participate in cases assigned."); *Idaho v. Freeman*, 507 F.Supp. 706, 722 (D.Id. 1981) (judges to be disqualified "only in proper cases" and "only if the basis is reasonable"). The Senate Judiciary Committee discussing the amendments stated:

> Disqualification for lack of impartiality must have a *reasonable* basis. Noting in this proposed legislation should be read to warrant the transformation of a litigant's fear that a judge may decide a question against him into a "reasonable fear" that the judge will not be impartial.

S. Rep. No. 93-419, 93d Cong., 1st Sess. 1973, at p.5 (emphasis in original).

The facts in the instant case are these. Judge Murray joined the Sierra Club in 1969. When he was notified of his appointment to the bench in 1971, he resigned from membership in the Sierra Club. He has maintained no contact with the club in any capacity since his appointment. The court must now consider whether its membership in the Sierra Club, which ended thirteen years before this case was initiated and fourteen years before the beginning of this trial, would cause the reasonable person to harbor doubts.

Although the Fourth Circuit has not specifically address this issue, the case law in other circuits is clear. Mere prior association does not form a reasonable basis for questioning a judge's impartiality. *Maier*, *supra*, 758 F.2d at 1581 (judge's former association with the Air Force does not reasonably raise appearance of partiality); *Brody v. President & Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981), *cert. denied*, 102 S.Ct. 1731, 455 U.S. 10 72 L.Ed.2d 148 (judge's having graudated from defendant university, without more, did not raise reasonable basis to question imparitiality).

Simkins attempts to distinguish the above cases on the ground that Sierra Club is, among other things, a

politic advocacy group. Simkins argues in essence that membership by a judge at any time in his or her life permanently taints that judge. The court does not agree. Litigants are not entitled to a judge free of any personal history. *Freeman, supra.*, 507 F.Supp. 706 (judge's status as regional representative for the Church of Jesus Christ of Latter-Day Saints not grounds for disqualification in suit challenging state's right to rescind ratification of the E.R.A., in spite of the stance of that church against the E.R.A.); *Maier, supra.*; *Brody, supra.* Such a judge does not exist. Litigants are entitled to a judge free of bias or partiality. As discussed above, mere prior association does not raise a reasonable specter of partiality. Here, the court finds of special weight the fact that this prior association ended over fourteen years before the trial.[5]

In contrast, the cases raised by defendant to support its motion all involve circumstances in which either the judge or a member of the judge's staff maintained some type of ongoing relationship with either parties or counsel. In *Hall, supra.*, 695 F.2d 175, the magistrate's law clerk was a member of the plaintiff class. In addition, before decision in the case was rendered, she had accepted an offer of employment from the counsel for plaintiff. In spite of the magistrate's disclaimer, the appearance of partiality was raised because of the relationship of an integral member of the magistrate's staff with plaintiffs. In *Potashnick v. Port City Construction Co.*, 609 F.2d 1101 (5th Cir.), *cert. denied*, 449 U.S. 820 (1980), the judge's father was senior partner of plaintiff's law firm, and plaintiff's counsel and the judge had made some real estate investments together. *United*

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[5] The court in *Maier, supra.*, focussed especially on the gap in time since the association alleged to be the source of the impartiality: "The Chief Judge has been retired from the Air Force Reserve or any military organization for *nine* years." 690 F.2d at 1581 (emphasis in original).

States v. Conforte, 457 F.Supp. 641 (D.Nev. 1978) involved a judge who had rejected the defendant's application to a bridge club because of the defendant's criminal past and had also made negative remarks about the defendant at a cocktail party, prior to the charges on which the defendant appeared before him were lodged.

The court further notes that counsel have not complied with the timeliness requirement of this statute. A party is under a duty to raise the disqualification issue at the earliest moment after discovery of the facts supporting the recusal. *Hall, supra*, 695 F.2d at 179; *Duffield v. Charleston Area Medical Center, Inc.*, 503 F.2d 512, 515-516 (4th Cir. 1974). A party may not use this issue "as part of its trial strategy". *Potashink, supra.*, 609 F.2d at 1115. The Fifth Circuit, in granting the defendant's motion for disqualification, explicitly stated in *Hall, supra.*:

> SBA counsel did not remain silent after becoming aware of all relevant facts. She did not lie in wait to determine whether her client would prevail and then file the motion only because she was disgruntled with the result.

695 F.2d at 179. Judge Murray informed counsel of his prior membership in the Sierra Club in February 1985. The motion for recusal was not entered until September 1986, after an adverse judgment. Even if Judge Murray's prior association with Sierra Club might create an appearance of partiality, Simkins waived this issue by reserving it until after the adverse judgment. Accordingly, the court will not grant the relief Simkins requests on this basis.

Motion to Amend Findings of Fact under Rule 52(b) and for Other Relief under Rule 59(a)

Simkins raises two challenges to the verdict. First, defendant alleges that the damages are excessive, in that

they exceed the relief requested by Sierra Club. Simkins argues that the judgment should be altered to reflect the relief requested. Second, Simkins alleges that the court changed the case from one of failure to comply with filing requirements to a case for affirmative pollution. Simkins argues that, because of this, the court should alter or amend the judgment to reflect the evidence of lack of pollution, re-hear the case and make additional findings of fact on the lack of pollution, or grant a new trial. The court will discuss each in turn.

Excessive Damages

The court finds that, because the damages awarded are well below the statutory maximum, the damages are *prima facie* not excessive. The Act itself, and not the a court may award. Section 309(d) of the Act states:

> Any person who violates section 1311, 1312, 1316, 1317, 1318, 1328, or 1345 of this title, or any permit conditions or limitation implementing any of such sections in a permit issued under section 1342 of this title by the Administrator, or by a State, or in a permit issued under section 1344 of this title by a State, and any person who violates any order issued by the Administrator under subsection (a) of this section, shall be subject to a civil penalty not to exceed $10,000 per day of such violation.

33 U.S.C. 1319(d). Simkins failed to comply with Section 308, 33 U.S.C. Section 1318, by failing to file its discharge monitoring reports, for a period of over three years, a period of 977 days. This fact is not contested. Plaintiff's proposed Findings of Fact and Conclusions of Law, Paragraphs 14 and 25. (Simkins underlined these paragraphs in blue, indicating that Simkins agreed with the statements made.) Further, the law in this circuit is clear. Penalties are to be assessed per day of violation, as the language of the statute suggests, and not per violation, as Simkins argues. *Chesapeake Bay*

Foundation v. Gwaltney of Smithfield, 791 F.2d 304, 314 (4th Cir. 1986).[6] In addition, Sierra Club in its complaint requested that the court "Order Defendant to pay civil penalties of $10,000 per day of violation for each violation pursuant to Sections 309(d) and 505(a) of the Act, 33 U.S.C. Sections 1319(d) and 1365(a)." Complaint, page. 5. Simkins cannot now state that it had no notice of the possible penalties that could be assessed. The court finds that Simkins does not state an adequate ground for alteration or amendment of the judgment.

Basis of the Court's Finding

The court granted plaintiff's motion for partial summary judgment on the issue of liability. Trial was held solely on the amount of damages and penalties. Each side had the opportunity to present evidence. Simkins now wishes to present further evidence to the court.

The court rejects Simkins' contention that it changed the suit to one for the "possibility of pollution". The court based its award on the fact that Simkins failed to comply with the reporting requirements of its NPDES for a period of 977 days. Memorandum and Order, July 31, 1986, p. 15-16.[7] Defendant could offer no proof in the form that it should have, that of DMRs, because it failed to file them. *Gwaltney, supra.*, 791 F.2d at 316. The court could permissibly conclude that Simkins had

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[6] The Supreme Court has recently granted *certiorari* in this case on the issue of whether citizen suits seeking penalties may be brought under the Act for past violations which are not continuing.

[7] Simkins contends that, as it was only required to file 11 DMRs during this time period, it committed only 11 violations and therefore should be assessed a maximum of $110,000. This position is contrary to both the language of the statute and the decision in *Gwaltney*.

not established its burden of demonstrating compliance.[8] Proof of the nature now proffered retroactively would relate only to the mitigation of damages. And, as the court noted in its Memorandum and Order of July 31, 1986, it took into account the fact that the failure to file DMRs was "not so egregious as to warrant the full assessment of $10,000 per day for each violation", but chose instead to assess only $1,000 per day for each violation. The court finds that Simkins does not provide an adequate reason to alter or amend the judgment.

Third, the evidence that Simkins now wishes to present to the court in a new trial, such as blueprints of its plant and the lack of use of one of its outfalls, to demonstrate lack of pollution, was in its exclusive control in June of 1985. Defendant could have discovered it by a due dilligence inspection of its own records and plant. The court finds that this is not new evidence of the type to merit a new trial. Accordingly, the court will enter a separate order denying Simkins' Motion in its entirety.

For the reasons outlined in the foregoing memorandum, it is this 16th day of March, 1987, by the United States District Court for the District of Maryland

ORDERED:

1. that Simkins Industries, Inc.'s Motion for Additional Findings of Fact, for Amendment to Findings of Fact, and for Amendment and Alteration of Judgment and for a Rehearing and New Trial be, and hereby is, *Denied;* and

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[8] Congress makes no distinction in the amount of penalty for actual pollution and that for failure to comply with state reporting requirements. Section 309(d), 33 U.S.C. Section 1319(d). Therefore, evidence that no pollution existed is not relevant to the court's decision to assess penalties for failure to comply with Maryland's reporting requirements.

2. that the Clerk of the Court mail copies of this memorandum and order to all parties.

/s/ Herbert F. Murray
United States District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

May 31, 1988

To: John F. King, Esq.
Guerdon Macy Nelson, Esq.
David Foxwell Albright, Esq.
Harley Thomas Howell, Esq.

NOTICE OF JUDGMENT

Judgment was entered this date in Case Number(s): 87-1600

The Court's opinion is enclosed.

* * * *

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1600

SIERRA CLUB,
Plaintiff-Appellee,
v.

SIMKINS INDUSTRIES, INC.,
Defendant-Appellant.

[Filed July 27, 1988]

On Petition for Rehearing with Suggestion for Rehearing In Banc

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The appellant's petition for rehearing and suggestion for rehearing in banc were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Chief Judge Winter, and the concurrence of Judge Ervin and Senior Judge Butzner.

For the Court

/s/ John M. Greacen
Clerk

APPENDIX G

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Civil Action No. HM84-4018

SIERRA CLUB
530 Bush Street
San Francisco, California 94108,
Plaintiff

v.

SIMKINS INDUSTRIES, INC.
P.O. Box 3249
Baltimore, Maryland 21228

Serve On: Leon Simkins,
President,
Simkins Industries, Inc.
P.O. Box 3249
Baltimore, MD 21228,
Defendant

COMPLAINT

Statement of the Case

1. This is a citizen suit, brought under § 505 of the Clean Water Act ("the Act"), 33 U.S.C. § 1365, for the Defendant's violations of the terms and provisions of its National Pollutant Discharge Elimination System ("NPDES") permit number MD0058033.

Jurisdiction and Venue

2. This Court has subject matter jurisdiction over the claims set forth in this Complaint, by virtue of § 505

(a)(1) of the Act, 33 U.S.C. § 1365(a)(1), and 28 U.S.C. § 1331.

3. On August 31, 1984, Plaintiff gave notice of the violations and of its intent ot file suit to the Administrator of the United States Environmental Protection Agency ("EPA"), to the Regional Administrator, Region 3, United States Environmental Protection Agency, to the Assistant Secretary of Environmental Programs, Department of Health and Mental Hygiene, to the Director of Water Management Administration, Office of Environmental Programs, and to the Defendant, as required by § 505(b)(1)(A) of the Act, 33 U.S.C. § 1365(b)(1)(A).

4. Sixty days have passed since the Plaintiff gave notice to the Defendant and neither the EPA nor the Maryland Department of Health and Mental Hygiene. Office of Environmental Programs, has commenced and diligently prosecuted a court action to redress the violations.

5. Venue is appropriate in the District of the State of Maryland pursuant to § 505(c)(1) of the Act, 33 U.S.C. § 1365(c)(1) because the source of the violations complained of its located in this District.

Parties

6. Plaintiff, Sierra Club, is a non-profit corporation with its principal place of business in San Francisco, California. The Sierra Club is a national conservation organization with many members in the Chesapeake Bay area, dedicated to protecting natural resources, including water.

7. Members of the Sierra Club reside in Maryland, in the vicinity of the Patapsco River, and recreate in, or or near, and otherwise use and enjoy, the Patapsco River and the water system of which it is a part. The quality of the Nation's waters and the waters of the

State of Maryland directly affects the health, recreational, aesthetic, and environmental interests of Sierra Club's members. The interests of Sierra Club's members have been, are being and will be adversely affected by the failure of Defendant, Simkins Industries, Inc., to comply with its NPDES permit requirements.

8. Defendant, Simkins Industries, Inc. is a corporation organized under the laws of the State of Connecticut. Defendant operates a papermill which manufactures cardboard.

Background

9. Section 301(a) of the Act, 33 U.S.C. § 1311(a), prohibits the discharge of pollutants from a point source into navigable waters of the United States, unless it is in compliance with various enumerated sections of the Act. Among other things, § 301(a) prohibits such discharges not authorized by or in violation of the terms of an NPDES permit pursuant to § 402 of the Act, 33 U.S.C. § 1342.

10. Under § 402(a)(b) of the Act, 33 U.S.C. § 1342 (a)-(b), the Administrator of EPA has authorized the Maryland Department of Health and Mental Hygiene, Office of Environmental Programs to issue NPDES permits. The applicable Maryland law is Md. [Health-Environmental] Ann. Code § 9-322, *et seq.* ("the Statute").

11. The State of Maryland Department of Health and Mental Hygiene, Office of Environmental Programs pursuant to § 9-324 of the Statute, issued to Defendant NPDES permit number MD0058033 which authorizes Defendant to discharge limited quantities of pollutants into the North Branch Patapsco River.

12. Section 308 of the Act, 33 U.S.C. § 1318, requires NPDES permittees to establish and maintain records; install, use and maintain monitoring equipment; sample effluents; and report on a regular basis to the permit-

issuing Agency regarding the facility's discharge of pollutants. The reports consist of Discharge Monitoring Reports (DMRs) and Non-Compliance Reports (NCRs).

General Allegations

13. Defendant operates a papermill which manufactures cardboard. It discharges the treated waters from its operations through point sources into the North Branch Patapsco River pursuant to NPDES permit number MD0058033. North Branch Patapsco River and the Patapsco River are navigable waters of the United States.

14. Defendant has violated the waste water discharge limits contained in its NPDES permit, as set forth in a letter to the Defendant dated August 31, 1984, attached hereto as Exhibit A and incorporated by reference herein.

Claim for Relief

15. Plaintiff realleges and incorporates by reference herein the allegations of paragraphs 1 through 14 of this Complaint.

16. Defendant's waste water discharges identified in paragraph 14 are discharged from a point source into navigable waters of the United States within the meaning of 33 U.S.C. § 1311.

17. Defendant's waste water discharge identified in paragraph 14 is a separate violation of § 301(a) of the Act, 33 U.S.C. § 1311(a), for each day on which it occurred.

Relief Requested

18. WHEREFORE, Plaintiff, Sierra Club, respectfully requests this Court to grant the following relief:

A. Declare Defendant, Simkins Industries, Inc. to have violated the Clean Water Act, 33 U.S.C. §§ 1311 and 1342;

B. Enjoin Defendant from operating its hazardous waste treatment plant in Baltimore, Maryland in such a manner as will result in further violation of Defendant's NPDES permit number MD0058033;

C. Provide Plaintiff with a copy of all future reports which Defendant submits to the State of Federal government related to Defendant's NPDES permit at all times it is submitted to these authorities;

D. Order Defendant to pay civil penalties of $10,000 per day of violation for each violation pursuant to §§ 309(d) and 505(a) of the Act, 33 U.S.C., §§ 1319(d) and 1365(a);

E. Award Plaintiff costs (including reasonable attorney, witness and consultant fees) as authorized by the Act, 33 U.S.C. § 1365(d); and

F. Award such other relief as this Court deems appropriate.

Respectfully submitted,

/s/ John F. King
JOHN F. KING

/s/ G. Macy Nelson
G. MACY NELSON
800 Fidelity Building
Baltimore, Maryland 21201
752-1630
Attorneys for Sierra Club

LAW OFFICE
ANDERSON, COE & KING

August 31, 1984

Mr. Leon Simkins, President
Simkins Industries, Inc.
P.O. Box 3249
Baltimore, Maryland 21228

Dear Mr. Simkins:

Section 505(b) of the Clean Water Act ("the Act"), 33 U.S.C. § 1365(b), requires that 60 days prior to the filing of a citizen's suit in Federal District Court under § 505(b) of the Act, the alleged violator, the Environmental Protection Agency, and the State in which the alleged violation occurred be given notice of the alleged violations.

The Sierra Club hereby places you on notice, pursuant to 33 U.S.C. § 1365(b), that they believe that Simkins Industries, Inc. in Baltimore, Maryland, has violated and continues to violate "an effluent standard or limitation" under § 505(a)(1)(A) of the Act, 33 U.S.C. 9 1365 (a)(1)(A), by failing to comply with NPDES/SPDES permit No. MD0058033, issued under 33 U.S.C. § 1342, § 402 of the Act, in the following respects. (A copy of your permit is attached hereto.)

1. Failure to file a DMR for the reporting period from 81/08/01 to 81/08/31 for a total of two violations.

2. Failure to file a DMR for the reporting period from 81/09/01 to 81/09/30 for a total of two violations.

3. Failure to file a DMR for the reporting period from 81/10/01 to 81/10/31 for a total of two violations.

4. Failure to file a DMR for the reporting period from 81/11/01 to 81/11/30 for a total of two violations.

5. Failure to file a DMR for the reporting period from 81/12/01 to 81/12/31 for a total of two violations.

6. Failure to file a DMR for the reporting period from 82/01/01 to 82/01/31 for a total of two violations.

7. Failure to file a DMR for the reporting period from 82/02/01 to 82/02/28 for a total of two violations.

8. Failure to file a DMR for the reporting period from 82/03/01 to 82/03/31 for a total of two violations.

9. Failure to file a DMR for the reporting period from 82/04/01 to 82/04/30 for a total of two violations.

10. Failure to file a DMR for the reporting period from 82/05/01 to 82/05/31 for a total of two violations.

11. Failure to file a DMR for the reporting period from 82/06/01 to 82/06/30 for a total of two violations.

12. Failure to file a DMR for the reporting period from 82/07/01 to 82/07/31 for a total of two violations.

13. Failure to file a DMR for the reporting period from 82/08/01 to 82/08/31 for a total of two violations.

14. Failure to file a DMR for the reporting period from 82/09/01 to 82/09/30 for a total of two violations.

15. Failure to file a DMR for the reporting period from 82/10/01 to 82/10/31 for a total of two violations.

16. Failure to file a DMR for the reporting period from 82/11/01 to 82/11/30 for a total of two violations.

17. Failure to file a DMR for the reporting period from 82/12/01 to 82/12/31 for a total of two violations.

18. Failure to file a DMR for the reporting period from 83/01/01 to 83/01/31 for a total of two violations.

19. Failure to file a DMR for the reporting period from 83/02/01 to 83/02/28 for a total of two violations.

20. Failure to file a DMR for the reporting period from 83/03/01 to 83/03/31 for a total of two violations.

21. Failure to file a DMR for the reporting period from 83/04/01 to 83/04/30 for a total of two violations.

22. Failure to file a DMR for the reporting period from 83/05/01 to 83/05/31 for a total of two violations.

23. Failure to file a DMR for the reporting period from 83/06/01 to 83/06/30 for a total of two violations.

24. Failure to file a DMR for the reporting period from 83/07/01 to 83/07/31 for a total of two violations.

25. Failure to file a DMR for the reporting period from 83/08/01 to 83/08/31 for a total of two violations.

26. Failure to file a DMR for the reporting period from 83/09/01 to 83/09/30 for a total of two violations.

27. Failure to file a DMR for the reporting period from 83/10/01 to 83/10/31 for a total of two violations.

28. Failure to file a DMR for the reporting period from 83/11/01 to 83/11/30 for a total of two violations.

29. Failure to file a DMR for the reporting period from 83/12/01 to 83/12/31 for a total of two violations.

30. Failure to file a DMR for the reporting period from 84/01/01 to 84/01/31 for a total of two violations.

31. Failure to file a DMR for the reporting period from 84/02/01 to 84/02/29 for a total of two violations.

32. Failure to file a DMR for the reporting period from 84/03/01 to 84/03/31 for a total of two violations.

Very truly yours,

/s/ John F. King
JOHN F. KING

/s/ G. Macy Nelson
G. MACY NELSON

cc: Mr. William D. Ruckelshaus
Mr. Thomas P. Eichler
Mr. William Eichbaum
Mr. Richard Sellers
Mr. Vernon Russel
Mr. Ronald Nelson